76-1714

No. ——

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

FRANK ROSENTHAL, *Appellant,*

v.

STATE OF NEVADA AND
STATE OF NEVADA GAMING COMMISSION,
Appellees.

On Appeal from the Supreme Court of Nevada

JURISDICTIONAL STATEMENT

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STATE OF NEVADA AND
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On Appeal from the Supreme Court of Nevada

JURISDICTIONAL STATEMENT

Frank Rosenthal appeals from the judgment of the Supreme Court of the State of Nevada which reversed a decision of the Eighth Judicial District Court of the State of Nevada in and for the County of Clark.

OPINIONS BELOW

The opinion of the Supreme Court of Nevada (App. A, *infra,* pp. 33-44) has been reported at 559 P.2d 830. It has not been officially reported. The opinion of the District Court in and for Clark County, Nevada (App. E, *infra,* pp. 51-58) is not reported.

JURISDICTION

The judgment of the Supreme Court of Nevada was entered on February 3, 1977. (App. B, *infra,* p. 45.) A petition for rehearing was denied by that court on March 9, 1977. (App. C, *infra,* p. 47.) The Notice of Appeal was filed in the Supreme Court of Nevada on May 10, 1977. (App. D, *infra,* p. 49). Further information supporting the jurisdiction of this Court is given in the Statement, *infra,* pp. 6-13.

Jurisdiction to review the judgment below is conferred on this Court by 28 U.S.C. § 1257(2). The following cases sustain the jurisdiction of this Court:

(a) *Connally* v. *General Construction Co.,* 269 U.S. 385 (1926); *Kunz* v. *New York,* 340 U.S. 290 (1951).

(b) *West Chicago St. R. Co.* v. *Illinois ex rel. Chicago,* 201 U.S. 506 (1906); *Chicago, B. & Q. R. Co.* v. *Illinois ex rel. Commissioners,* 200 U.S. 561 (1906); *WHYY, Inc.* v. *Borough of Glassboro,* 393 U.S. 117 (1968); *Sullivan* v. *Little Hunting Park, Inc.,* 396 U.S. 229 (1969); *Charleston Federal Savings & Loan Ass'n* v. *Alderson,* 324 U.S. 182 (1945).

(c) *Ohio Valley Water Co.* v. *Ben Avon Borough,* 253 U.S. 287 (1920); *St. Joseph Stock Yards* v. *United States,* 298 U.S. 38 (1936).

(d) *Board of Regents* v. *Roth,* 408 U.S. 564 (1972); *Greene* v. *McElroy,* 360 U.S. 474 (1959); *Paul* v. *Davis,* 424 U.S. 693 (1976).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment of the Constitution of the United States provides, in pertinent part, as follows:

> Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; . . .

STATUTES INVOLVED

NRS 463.315 provides, in pertinent part:

> 1. Any person aggrieved by a final decision or order of the commission made after hearing or rehearing by the commission pursuant to NRS 463.312, and whether or not a petition for rehearing was filed, may obtain a judicial review thereof in the district court of the county in which the petitioner resides or has his or its principal place of business.[1]

NRS 463.140 provides, in pertinent part:

> 1. The provisions of this chapter with respect to state gaming licenses and manufacturer's, seller's and distributors licenses shall be administered by the state gaming control board and the Nevada gaming commission, which are hereby charged with administering the same for the protection of the public and in the public interest in accordance with the policy of this state.
>
> 2. The board shall investigate the qualification of each applicant under this chapter before any license is issued or any registration, finding of suitability or approval of acts or transactions for which commission approval is required or per-

---

[1] NRS 463.312 provides for procedures, defenses, forms for hearing and decision to be used by the Gaming Commission when the Gaming Control Board has started a complaint in regard to gaming operations and the Commission is satisfied that grounds exist for disciplinary action.

mitted is granted and shall continue to observe the conduct of all licensees and other persons having a material involvement directly or indirectly with a licensed gaming operation or registered holding company to the end that licenses shall not be issued to nor held by nor shall there be any material involvement directly or indirectly with a licensed gaming operation or registered holding company by unqualified or disqualified persons or unsuitable persons or persons whose operations are conducted in an unsuitable manner or in unsuitable or prohibited places or locations. The board shall have full and absolute power and authority to recommend the denial of any application, or the limitation, conditioning or restriction of any license, registration, finding of suitability or approval or the suspension or revocation of any license, registration, finding of suitability or approval of the imposition of a fine upon any person licensed, registered, found suitable or approved, for any cause deemed reasonable by the board. The commission shall have full and absolute power and authority to deny any application or to limit, condition, restrict, revoke or suspend any license, registration, finding of suitability or approval, or to fine any person licensed, registered, found suitable or approved, for any cause deemed reasonable by the commission.

NRS 463.220 provides, in pertinent part:

> 4. After final order of the state gaming control board recommending denial of an application, the commission, after considering the recommendation of the board, may:
>
> (a) Deny the application;
>
> (b) Remand the matter to the board for such further investigation and reconsideration as the commission may order; or

> (c) By unanimous vote of the members present, grant the application for a license, registration, finding of suitability or approval.
>
> • • • • • • • • • •
>
> 6. The commission shall have full and absolute power and authority to deny any application for any cause deemed reasonable by such commission. In the event an application is denied, the commission shall prepare and file its written decision upon which its order denying such application is based.

Other statutory provisions and Regulations of the Nevada Gaming Control Board and Gaming Commission are set forth in Appendix G, *infra,* pp. 61-66.

QUESTIONS PRESENTED

(1) Whether NRS 463.140 and NRS 463.220, which grant the Nevada State Gaming Control Board and State Gaming Commission power to deny applications to "unsuitable persons" and give them "full and absolute power and authority to deny any application [for a gaming license] for any cause deemed reasonable by the board [or commission]" lack ascertainable standards and thus are unconstitutionally vague, in violation of the due process clause of the Fourteenth Amendment.

(2) Whether the Supreme Court of Nevada was correct in holding that gaming is "a matter reserved to the States within the meaning of the Tenth Amendment," with the consequence that there is "no room for federally protected constitutional rights."

(3) Whether NRS 463.315, as construed by the Supreme Court of Nevada, improperly prohibits ap-

pellant from obtaining judicial review of the denial of his application for a gaming license by the Nevada State Gaming Commission in contravention of appellant's Fourteenth Amendment rights.

(4) Whether the procedures followed by the Nevada State Gaming Commission in denying appellant a gaming license violated the due process clause of the Fourteenth Amendment.

STATEMENT

Appellant was employed as the Executive Consultant to the Chairman of the Board of the Argent Corporation, which owned and managed several hotels and casinos in Las Vegas, Nevada. He had for several years held a valid work permit issued by the Nevada Gaming Control Board, pursuant to NRS 463.335 (App. G, pp. 61-64, *infra*).

After holding hearings on January 23 and 24, 1975, the Nevada State Gaming Commission determined that appellant was required to obtain a license as a key employee of the Argent Corporation pursuant to NRS 463.595 (App. G, *infra,* p. 65), which provides that those officers and other principal employees of a holding company whom the Commission determines are engaged in the administration or supervision of the gaming activities of a corporate gaming licensee, "must be found suitable therefor and may be required to be licensed by the Commission." A person not found suitable must be removed from any position where he is engaged in administration, supervision or other involvement with gaming activities.

Pursuant to this Order, appellant on July 18, 1975, applied to the Nevada State Gaming Board for a

gaming license. After a hearing on January 14, 1976, the Gaming Control Board unanimously voted to deny the application. The Board stated the following reasons:

> "the applicant is a person whose licensing by the state would reflect or tend to reflect discredit upon the State of Nevada by reason of A, a North Carolina court finding of guilt for conspiracy to bribe an amateur athelete; B, the testimony of the one Mickey Bruce in Senate subcommittee hearings that the applicant attempted to bribe him to throw the outcome of the 1960 Oregon-Michigan football game; C, statements by police officers Dardis and Clode to a Senate subcommittee and the Florida Racing Commission that the applicant admitted he was corrupting public officials in return for protection; and D, the applicant's being barred from racetracks and parimutual operations in the State of Florida."

On January 22, 1976, the Nevada State Gaming Commission, pursuant to NRS 463.220(4), *supra,* pp. 4-5, which provides for review by the Commission of the denial of an application for a license by the Gaming Control Board, held a hearing to decide whether to affirm or reverse the Board's decision. Neither appellant nor his counsel, nor some of the Commissioners, had received the transcript of the Board hearing until 7 p.m. on the night prior to the Commission hearing. Some of the Commissioners had not read the transcript. Nonetheless, the Gaming Commission refused to grant appellant a continuance to prepare his case and to obtain testimony of persons involved in the incidents cited by the Board as reasons for denying him a license. At the conclusion of the hearings, the Gaming Commission unanimously voted to affirm the Board's decision.

Under Gaming Control Regulation 5.011(6), the effect of denying appellant a gaming license was to prohibit him from being employed "in any capacity in or about any licensed establishment (including hotel, restaurant or bar facilities, as well as the gaming casino)." (App. G, *infra,* p. 66.) In short, the Commission's finding of unsuitability in regard to a license as a key employee automatically revoked appellant's work permit under the Commission's Regulations. As a result, appellant could no longer pursue any form of employment in gaming, Nevada's largest industry, despite the fact that he had held a valid work permit for several years.

Proceedings Below

On February 17, 1976, appellant, pursuant to NRS 463.315, sought judicial review, in Nevada's Eighth Judicial District Court, of the Gaming Commission's decision to deny him a gaming license. The complaint expressly claimed that the denial of the license on the basis of the Nevada statutes violated several provisions of the Federal Constitution, including, explicitly, the Fourteenth Amendment. (Petition for Judicial Review, pp. 2-3.) Appellant claimed specifically that the state statutes purporting to authorize the Commission's action were unconstitutional under the federal constitution, and also that the procedures used by the Commission did not meet constitutional standards. (Petition for Judicial Review, p. 3.)[2] The prayer for

[2] The Nevada Supreme Court said that the Petition for Judicial Review "did not challenge the constitutionality of the licensing statutes." (App. A, *infra,* p. 36.) It is difficult to know how the court reached this conclusion. After listing several provisions of the federal constitution, including the Fourteenth Amendment, the Petition for Judicial Review stated: "the statutory authority of the COMMISSION is unconstitutional" (Petition for Judicial Review, p. 3, paragraph 8(b)), and that the decision of the Gaming Commission denying appellant a license was in excess of the statutory authority of the Commission, "which statutes are unconstitutional." (Petition for Judicial Review, p. 3, unnumbered paragraph after paragraph 8(e)). *See also* n. 3, *infra.*

relief asked that the Gaming Commission decision be declared void, that appellant be reinstated to his job, and for other appropriate relief. (Petition for Judicial Review, p. 4.)

A motion was made by the appellees to dismiss for lack of jurisdiction, and this was denied by the district court. At trial, the appellant argued orally and in his brief that the Gaming Commission decision, based on the Nevada statutes, violated several "constitutional provisions," including, *inter alia,* the due process clause of the Fourteenth Amendment.

The Eighth Judicial District Court held NRS 463.140 and NRS 463.220 "facially unconstitutional" for lack of ascertainable standards (App. E, *infra,* p. 53), and therefore found the basis on which the Commission's hearing was held to be "violative of the Due Process Clause of the Fourteenth Amendment of the United States Constitution." (App. E, *infra,* p. 53.) The court characterized the licensing hearing as an adjudication in which the fundamental requirements of Due Process are applicable, and *"at the forefront of Due Process is the right to know what standards have been prescribed."* (App. E, *infra,* p. 54; emphasis in original.) The court also found that the manner in which the Gaming Commission hearing was conducted denied appellant due process of law in that appellant was not given sufficient notice to oppose the

charges against him, was not given an opportunity to present evidence or to cross-examine witnesses, or to know the substance of the claims against him which had been based on confidential material. (App. E, *infra,* p. 55.) The court's Amended Judgment stated that NRS 463.140 and NRS 463.220 were "unconstitutional as applied" to appellant under "the mandates of the Due Process Clause of the Fourteenth Amendment of the United States Constitution." (App. F, *infra,* p. 59.) The court further held that the Commission hearings had denied the appellant due process "under the Fourteenth Amendment of the United States Constitution." (App. F, *infra,* p. 59.) The court enjoined enforcement of NRS 463.140 and 463.220 until adequate standards were established, reinstated appellant to his job, and enjoined any disciplinary action against appellant's employer. (App. E, *infra,* p. 58; App. F, *infra,* p. 60.)

The State and the Gaming Commission appealed to the Supreme Court of Nevada. On appeal, the present appellant argued that NRS 463.315, properly construed, provided for judicial review of the Gaming Commission's order denying him a license, and that failure to construe NRS 463.315 to provide for such judicial review "would raise serious federal constitutional questions" under, specifically, the due process clause of the Fourteenth Amendment. (Appellant's Answering Brief, pp. 8-12.) Appellant claimed he had adequate standing to seek review both because NRS 463.315 provided for review and because appellant had a constitutionally protected "liberty" and "property" interest in obtaining a license which would enable him to maintain his employment in the gaming industry. (Appellant's Answering Brief, pp. 24-30.) Appellant

argued that he was not afforded the minimum procedural protections required by the federal due process clause. (Appellant's Answering Brief, pp. 30-41.) Appellant raised and presented at some length the contention that the district court correctly held that NRS 463.140 and NRS 463.220 were unconstitutional under the Federal Constitution because they lacked ascertainable standards. (Appellant's Answering Brief, pp. 12-24.)

On February 3, 1977, the Nevada Supreme Court reversed the judgment of the district court and reinstated the decision of the Gaming Commission. (App. A, *infra,* pp. 33, 43.)

The Nevada Supreme Court held that NRS 463.315 did not provide for judicial review of denials of gaming license applications, and therefore, that the district court "should have granted the motion to dismiss" for lack of jurisdiction which the present appellees had filed. (App. A, *infra,* p. 37.) But then the court proceeded forthwith to consider and decide the federal constitutional questions which had been decided by the Nevada district court and which had been briefed and argued before the Supreme Court. Since the district court had decided the question of the constitutionality, under the federal constitution, of NRS 463.140 and NRS 463.220, the Nevada Supreme Court stated: "We proceed, therefore, to resolve that question." (App. A, *infra,* p. 37.)[3]

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[3] Despite the Nevada Supreme Court's statement to the contrary, appellant did challenge the constitutionality of the licensing statutes. *See* n. 2, *supra.* Consequently, the trial court had jurisdiction of the case under Nevada law regardless of NRS 463.315, because, as the Nevada Supreme Court stated, when a challenge to the constitutionality of statutes is made, "a court would have to resolve

The Nevada Supreme Court then decided that NRS 463.140 and NRS 463.220 are constitutional under the federal constitution. In reaching this result, the court used the following rationale: (1) it purported to read NRS 463.130[4] and Gaming Control Regulation 3.090[5] into the challenged statutory sections to provide the necessary specific standards (App. A, *infra,* pp. 37-38); (2) it said that even if this gloss was not added to NRS 463.140 and NRS 463.220, "the statutory standards alone are sufficient" because gaming is a privileged enterprise, which makes possible the placing of wide discretion in an administrative agency (App. A, *infra,*

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it. Jurisdiction to decide that issue would exist since the courts are charged with the duty to decide such a question." (App. A, *infra,* p. 36.)

[4] NRS 463.130 provides:

> 1. It is hereby declared to be the policy of the state that all establishments where gambling games are conducted or operated or where gambling devices are operated and manufacturers, sellers and distributors of certain gambling devices and equipment in the State of Nevada shall be licensed and controlled so as to protect the public health, safety, morals, good order and general welfare of the inhabitants of the State of Nevada, and to preserve the competitive economy and the policies of free competition of the State of Nevada.
>
> 2. Any license issued pursuant to this chapter shall be deemed to be a revocable privilege and no holder thereof shall be deemed to have acquired any vested rights therein or thereunder.

[5] Gaming Control Regulation 3.090 provides, in pertinent part:

> 1. No license, registration, finding or suitability, or approval shall be granted unless and until the applicant has satisfied the Commission that the applicant:
>
> a. Is a person of good character, honesty, and integrity;
>
> b. Is a person whose background, reputation and associations will not result in adverse publicity for the State of Nevada and its gambling industry; and
>
> c. Has adequate business competence and experience for the role or position for which application is made.

pp. 38-39); (3) it then asserted that gaming was "a matter reserved to the states within the meaning of the Tenth Amendment,"[6] and "within this context, we find no room for federally protected constitutional rights" (App. A, *infra,* p. 40); (4) it claimed that the district court incorrectly found that the Commission's actions involved procedural "unconstitutionality," and that the lower court finding of unconstitutionality actually referred to the due process clause of the Nevada,[7] not the United States Constitution (App. A, *infra,* p. 41); (5) it found Regulation 5.011(6) "inconsistent with the [Nevada] statutes providing for administrative and judicial review of the revocation of a work permit. Therefore, the regulation cannot stand." (App. A, *infra,* pp. 42-43); and (6) it noted "We particularly point to the fact that this opinion rests solely upon the State Gaming Control Act and Nevada case precedent. As we view this case, a federal question is not present." (App. A, *infra,* pp. 43-44.)

A petition for rehearing was denied by the Supreme Court of Nevada on March 9, 1977. (App. C, *infra,* p. 47.) Notice of Appeal was filed May 10, 1977. (App. D, *infra,* p. 49).

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[6] The Tenth Amendment of the United States Constitution provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

[7] The Nevada Constitution, Article I, section 8 provides, in pertinent part,

> "No person shall be subject to be twice put in jeopardy for the same offense; nor shall he be compelled, in a criminal case, to be a witness against himself, nor be deprived of life, liberty or property without due process of law; . . ."

THE QUESTIONS ARE SUBSTANTIAL

The Supreme Court of Nevada has decided significant and important constitutional questions which, in light of that decision, warrant review by this Court. NRS 463.140 and NRS 463.220 were held invalid by the state trial court on the ground that the statutes were repugnant to the due process clause of the Fourteenth Amendment of the United States Constitution. The Nevada Supreme Court has expressly addressed that question and has decided it in favor of the validity of the statutes. Thus the case falls within the jurisdictional statute. 28 U.S.C. § 1257(2). In reaching its result, the Nevada Supreme Court raised a new constitutional question through its holding that gaming is a "matter reserved to the states under the Tenth Amendment," so that there is "no room for federally protected constitutional rights" in this area. Such a novel and indeed startling decision requires review by this Court.

NRS 463.140 and NRS 463.220 permeate Nevada's scheme for the regulation of gaming. Plenary review of the decision below is necessary to decide whether these provisions lack ascertainable standards and are so vague as to be repugnant to the due process clause of the Fourteenth Amendment. The breadth of NRS 463.140 and NRS 463.220 also raises a question as to whether these provisions constitute an improper delegation of legislative power.

Plenary review of the decision below is also necessary as a matter of sound judicial administration. This would ensure that the assertion of rights based on the federal constitution cannot be frustrated by the use of two devices by a state court: (1) a claim that the Tenth Amendment leaves "no room for federally protected

constitutional rights" in this area; and (2) a finding that no federal question is presented by a case which was founded on the repugnancy of state statutes to the due process clause of the Fourteenth Amendment of the Federal Constitution. Sound judicial administration requires that such misreadings of the Constitution and such misconstruction of a reviewing court's proper role not be permitted to stand without consideration by this Court.

Finally, the questions here presented are substantial because the determination of the constitutional limits within which the regulation of gambling can be carried out by the States is becoming of increasing importance. For many years, Nevada has been the only State in which gambling is generally permitted. But now New Jersey has amended its constitution to permit gambling, and Florida may be taking steps to that end. Many states have state lotteries, and have legalized betting at or in connection with racetracks. Other states may soon be joining in these developments. All states which permit gambling will have to set up means for regulation. If the decision below is permitted to stand without review by this Court, it will be a precedent in support of the view that the regulation of gambling is outside the reach of the Federal Constitution, thus encouraging the States to establish regulations which do not meet federal constitutional standards. That question should be decided now for the guidance of state legislatures which are considering the questions associated with the regulation of gaming. In particular, it should be made clear that the reach of the Federal Constitution embraces all of the fifty States, and that all such regulatory provisions are indeed subject to federal constitutional requirements.

This case is not like *Rogers* v. *Alabama,* 192 U.S. 226 (1904), where this Court held that it may inquire whether the ground given in a state decision for refusing to pass on a federal constitutional question is actually advanced in order to bar review in this Court of claimed constitutional rights.[8] On the contrary, this is a case in which the state court, while saying that "a federal question is not present" (App. A, *infra,* p. 44) has in fact reviewed the federal constitutional questions, and disposed of them on striking and novel grounds.[9]

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[8] As this Court has stated, "Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." *Davis* v. *Wechsler,* 263 U.S. 22, 24 (1923). *Cf. Nickel* v. *Cole,* 256 U.S. 222, 225 (1921). Only if there is no pretense that the state supreme court "adopted its view in order to evade a constitutional issue, and the case has been decided upon grounds that have no relation to any federal question," is the court's decision accepted whether right or wrong. *Id.* In this case, there is both talk one way, and action another, and a decision expressly rested on the federal constitution, namely, the Tenth Amendment. Thus, there is no bar to this Court's jurisdiction over this case.

[9] When a state supreme court decides, because of its importance, or for any other reason, a federal constitutional question which it has discretion to disregard, this Court has held that it has jurisdiction of the case. *WHYY, Inc.* v. *Borough of Glassboro,* 393 U.S. 117, 119 (1968) (*per curiam*). As in *WHYY*, although for different reasons, the Nevada Supreme Court has decided a constitutional question which it stated it did not have to reach. Since federal constitutional questions were in fact decided by the Nevada Supreme Court, this Court has jurisdiction to review the decision below.

This conclusion is not affected by the fact that the Nevada Supreme Court said that the district court lacked jurisdiction of the case. *Sullivan* v. *Little Hunting Park, Inc.,* 396 U.S. 229, 231-234 (1969). Nor is an inquiry into "how and when the question of the validity of the statute was raised" necessary "when such question appears to have been actually considered and decided by that court. *Manhattan Life Ins. Co.* v. *Cohen,* 234 U.S. 123, 134; *Chicago, R.I. & P.R. Co.* v. *Perry,* 259 U.S. 548, 551; *Saltonstall* v. *Saltonstall,* 276 U.S. 260, 267; *Home Ins. Co.* v. *Dick,* 281 U.S. 397, 407; *Nickey* v. *Mississippi,* 292 U.S. 393, 394; *Whitfield* v. *Ohio,* 297 U.S. 431, 435-6." *Charleston Federal Savings & Loan Ass'n* v. *Alderson,* 324 U.S. 182, 185-186 (1945).

A fair consideration of *all* that the court below said and did, as distinguished from what it said at the close of its opinion, makes it clear that the Nevada Supreme Court's decision did not rest on non-federal grounds. In reaching the conclusion that no jurisdiction was conferred on state courts by NRS 463.315, the Nevada Supreme Court of necessity decided that appellant had no constitutionally protected liberty or property interests, although the appellant had argued that he had such interests which the Federal Constitution requires to be protected by judicial review. In reaching the conclusion that NRS 463.140 and NRS 463.220 were valid, the Nevada Supreme Court had to apply, even if not articulated, some standard of vagueness under the Federal Constitution. Federal constitutional grounds were in fact the real and underlying bases of the Nevada Supreme Court's decision. *See also West Chicago St. R. Co.* v. *Illinois ex rel. Chicago,* 201 U.S. 506, 519-520 (1906); *Chicago, B. & Q. R. Co.* v. *Illinois ex rel. Commissioners,* 200 U.S. 561, 580-581 (1906).[10] *Cf. Lawrence* v. *State Tax Comm'n.,* 286 U.S. 276, 281-282 (1932).

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[10] *See Ward* v. *Board of County Commissioners,* 253 U.S. 17, 22-23 (1920): "Of course, if non-federal grounds, plainly untenable, may be thus put forward successfully, our power to review easily may be avoided . . . But [this] qualification is a material one and cannot be disregarded without neglecting or renouncing a jurisdiction conferred by law and designed to protect and maintain the supremacy of the Constitution. . . ."

In any event, the state district court considered the federal constitutional questions and decided the case on the ground that NRS 463.140 and NRS 463.220 did not meet federal constitutional requirements. This question was directly presented to the Nevada Supreme Court by both parties to the case, and was passed on by the Nevada Supreme Court. *Cf. Charleston Federal Savings & Loan Ass'n., supra,* 324 U.S. at 185-186. Thus, in these respects, as well as others, the Nevada Supreme Court clearly exercised jurisdiction to review the order of the Gaming Commission despite protestations to the contrary.

Moreover, the Nevada Supreme Court did in effect accept jurisdiction of this case, and reviewed the proceedings of the Gaming Commission when it held that the consequence of that decision in denying the appellant's work permit was invalid. In reaching this conclusion it held that Regulation 5.011(6) was "inconsistent with the statutes providing for administrative and judicial review of the revocation of a work permit," and it concluded: "The regulation cannot stand." (App. A, *infra,* pp. 42-43.) The Supreme Court of Nevada also held "A portion of NRS 463.595 . . . does not square with the statutes providing for administrative and judicial review of the revocation of a work permit and cannot stand." (App. A, *infra,* p. 43.)

The questions presented are discussed more fully in the following portions of this Jurisdictional Statement.

I.

NRS 463.140 and NRS 463.220 Are Too Vague and Indefinite to Meet the Requirements of the Federal Constitution.

NRS 463.140 and NRS 463.220 are a central part of the State's method of controlling the gaming industry. They are also critical elements of an individual's ability to earn a living and to participate in a statewide industry. Such statutory provisions should comply with federal constitutional standards of due process. Yet, these particular statutes are so broad that they may fairly be said to be extreme examples of vague, standardless legislation. They taint the entire Nevada gaming control plan which rests on them. Their constitutional deficiencies thus warrant review by this Court.

A statute "which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Connally* v. *General Construction Co.,* 269 U.S. 385, 391 (1926). This due process requirement against vagueness rests on three grounds, none of which is adequately met by the Nevada statutes challenged here.

(1) A statute must not be so standardless as to leave the person to whom it is addressed unable to determine its meaning or the scope of its application. *Connally* v. *General Construction Co., supra.* NRS 463.140 and NRS 463.220 contain language so vague that it does not convey a definite requirement to a license applicant.[11] For example, NRS 463.140 uses

[11] Liquor licensing regulations have been required to contain

terms like "suitable," and "unsuitable," but nowhere defines them. Both NRS 463.140 and NRS 463.220 refer to "full and absolute power and authority" to deny a license "for any cause deemed reasonable" by the Board or Commission. It is difficult to think of phrases more vague or less indicative of clear meaning or application than "full and absolute power and authority" and "any cause deemed reasonable."[12]

As an aid to its conclusion that NRS 463.140 and NRS 463.220 were constitutional, the Nevada Supreme Court read into these sections the language found in NRS 463.130. Yet, having done this, the Nevada Supreme Court brushed aside this judicial gloss by stating that "[t]he sole responsibility for licensing is vested exclusively in the commission" (App. A, *infra*, p. 36), and by reiterating that the Gaming Commission had "full and absolute power and authority" to deny a license application for any cause deemed reasonable by the Commission (App. A, *infra*, pp. 36-37). Since the purported gloss of NRS 463.130 was at once retracted by the Nevada Supreme Court (or held to impart no limitation on the generality of NRS 463.140 and NRS 462.220), the constitutionality of these challenged sections must be tested by reference to the statutory language in NRS 463.140 and NRS 463.220 without regard to NRS 463.130.

"ascertainable standards . . . by which an applicant can intelligently seek to qualify for a license. . . ." *Hornsby* v. *Allen*, 326 F.2d 605, 612 (5th Cir. 1964). There is no reason why this should not also be true for gaming licensing statutes.

[12] In *Cline* v. *Frink Dairy Co.*, 274 U.S. 445 (1927), this Court struck down a state ban against combinations in restraint of trade which excepted combinations intended to market at a *"reasonable"* price commodities which would otherwise not be so marketed (emphasis added).

Even if the Nevada Supreme Court had in fact found that NRS 463.130 is an effective limitation on NRS 463.140 and NRS 463.220, ascertainable standards would still be lacking.[13] The Nevada Supreme Court also tried to impart specificity to the challenged sections by reference to a regulation of the Gaming Control Commission. *See* Regulation 3.090, quoted at p. 12, n. 5, *supra*.[14] Even if Regulation 3.090 were read to supplement NRS 463.140 and NRS 463.220, the statute would remain unconstitutionally vague. The regulation itself provides only that the Commission must be "satisfied" (itself a vague standard) of three things, none of which is defined.[15] These vague, standardless provisions (NRS 463.140, NRS 463.220, NRS 463.130 and Regulation 3.090) do not, by some mysterious synthe-

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[13] Reference to "public health, safety, morals, good order and general welfare," is little more than extended verbiage to disguise the power to prevent events an administrative body concludes are "prejudicial to the best interests of the people," a standard this Court found too indefinite to satisfy due process in *Gelling* v. *Texas*, 343 U.S. 960 (1952) (*per curiam*). This Court has similarly found an ordinance regulating applications to solicit membership in organizations based on "the general welfare of citizens" to lack ascertainable standards. *Staub* v. *City of Baxley*, 355 U.S. 313 (1958).

[14] These regulations were issued pursuant to the "uncontrolled discretion" given to the Gaming Commission to establish qualifications for licenses, NRS 463.170(4), App. G, *infra*, p. 61, which is itself an inadequate standard for legislative delegation.

[15] Regulation 3.090 refers to (a) good character, honesty and integrity; (b) background, reputation and associations which will not result in adverse publicity for Nevada or the gaming industry; and (c) adequate business competence or experience. No more definite enunciation of what is meant by any of these three provisions is found in the Regulation. Provision (b) raises the spectre of permitting trial (and conviction) by press publicity to constitute sufficient grounds for a license denial. Such restriction on freedom of association raises serious First Amendment questions.

sis, become one distinct, ascertainable or constitutional statute, as the Nevada Supreme Court concluded.

(2) Due process requires that a statute cannot be so vague that a reviewing court cannot discern whether administrative action rests on proper grounds or is a product of bias, prejudice or inadequate consideration. Statutory precision is required to forestall arbitrary, uneven or selective enforcement. *Interstate Circuit, Inc.* v. *Dallas,* 390 U.S. 676 (1968). Under NRS 463.140 and NRS 463.220, the Board and Commission can deny gaming license applications for any reason the Board or Commission themselves deem reasonable. This broad unconstrained language permits, indeed encourages, arbitrary and selective enforcement of the statute, the vice against which the due process and equal protection clauses are designed to provide protection. Read literally, as they must be, these statutory sections give the Board and the Commission *carte blanche,* and completely fail to provide legislatively prescribed standards for administrative action. *Kunz* v. *New York,* 340 U.S. 290 (1951).

(3) Under the requirements of due process, a too broadly worded statute must be held invalid as an undue delegation of legislative power.[16] In NRS 463.140 and NRS 463.220, the Nevada legislature has given the Board and Commission a blank check. Nothing

[16] Under Article 3, Section 1, of the Constitution of Nevada, the powers of government are divided between "three separate departments,—the Legislature, the Executive and the Judicial, and no persons charged with the exercise of powers belonging to one of these departments shall exercise any functions appertaining to either of the others," (with an exception not applicable here). Article 4, Section 1 of the Constitution of Nevada provides that "The Legislative Authority of the State shall be vested in a Senate and Assembly. . . ."

could be broader, in substance and in effect, than "full and absolute power" and "any cause deemed reasonable by the [board and] commission." As this Court has said, the requirement that a statute provide explicit standards is necessary lest the statute "impermissibly delegates basic policy matters . . . for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned* v. *City of Rockford,* 408 U.S. 104, 108-109, 113 and n. 22 (1972); *Hornsby* v. *Allen,* 326 F.2d 605, 610 (5th Cir. 1964).

NRS 463.140 and NRS 463.220 do not meet these three requirements of due process. These statutes—clear examples of vague and standardless legislation—transgress the boundaries of separation of powers. They make impossible an even-handed application of the law. They call into question the entire Nevada gaming control scheme. Merely because they relate to a unique industry, they should not be allowed to stand without full review by this Court.

II.

The Decision that Gaming is an Area Reserved to the States by the Tenth Amendment, and that the Due Process Clause of the Fourteenth Amendment Does Not Apply to Gaming, Raises Important Questions Which Warrant Review by this Court.

The court below sought to escape the application of federal constitutional due process standards to the gaming industry in Nevada by its decision that gaming is an area reserved to the states by the Tenth Amendment. (App. A, *infra,* p. 40.) Even if this assumption were correct,[17] there would still be no support for the

[17] This Court has rejected the argument that a tax on persons

conclusion that Fourteenth Amendment protections end wherever, under the Tenth Amendment or otherwise, the state's police power exists. This Court has never held that the requirements of the due process clause of the Fourteenth Amendment do not apply to an area which may be regulated by a state by virtue of the so-called "police power." Rather, even in regard to

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engaged in the business of accepting wagers infringed the police powers reserved to the states by the Tenth Amendment, *United States* v. *Kahriger*, 345 U.S. 22 (1953), even when that tax had a regulatory effect on wagering. This Court also rejected the argument that a statute forbidding interstate transportation of state lottery tickets was inconsistent with the Tenth Amendment. *Champion* v. *Ames* (The Lottery Case), 188 U.S. 321 (1903). Lower federal courts have not held gaming a matter reserved to the states, though one lower court has said that "Gaming per se, *may* be a matter primarily of state concern." *United States* v. *Kelley*, 254 F. Supp. 9, 16 (S.D.N.Y. 1966), *affirmed in part, reversed in part*, 395 F.2d 727 (2d Cir.), *cert. denied*, 393 U.S. 963 (1968) (emphasis added).

Cases challenging "The Travel Act", 18 U.S.C. § 1084, and "The Federal Anti-Wagering Law", 18 U.S.C. § 1952, on the ground that the statutes violated the Tenth Amendment have never held that regulation of gaming is reserved to the States. *See e.g., United States* v. *Nichols*, 421 F.2d 570, 574 (8th Cir. 1970); *Martin* v. *United States*, 389 F.2d 895, 896 (5th Cir. 1968); *Marshall* v. *United States*, 355 F.2d 999, 1004 (9th Cir. 1966), *cert. denied*, 385 U.S. 815, *rehearing denied*, 385 U.S. 964 (1966); *United States* v. *Barrow*, 363 F.2d 62, 65 (3rd Cir. 1966), *cert. denied*, 385 U.S. 1001 (1967); *United States* v. *Ryan*, 213 F. Supp. 763, 766 (D. Colo. 1963) (gaming called area in which states have power to legislate, but no designation of gaming regulation as a power reserved to States by the Tenth Amendment); *United States* v. *Zirpolo*, 288 F.Supp. 993, 1009 (D.N.J. 1968), *reversed on other grounds*, 450 F.2d 424 (3rd Cir. 1971); *United States* v. *Gerhart*, 275 F. Supp. 443, 450 (S.D.W. Va. 1967); *United States* v. *Borghese*, 235 F. Supp. 286, 296-297 (S.D.N.Y. 1964), *vacated on other grounds*, 372 F.2d 950 (2d Cir. 1967); *United States* v. *Smith*, 209 F. Supp. 907, 915 (E. D. Ill. 1962).

Thus, no court has directly held that gaming regulation is a matter reserved to the states by the Tenth Amendment.

regulation of liquor, an area in which the states have unusually wide latitude by virtue of the Twenty-First Amendment, this Court has found that the dictates of the due process clause must be obeyed. *California* v. *LaRue*, 409 U.S. 109, 115 (1972); *Wisconsin* v. *Constantineau*, 400 U.S. 433 (1971).[18] Even in regard to state actions affecting prisoners in state prisons, an area clearly within the traditional reach of the state police power, this Court has held that Fourteenth Amendment due process protections apply. *See e.g., Wolff* v. *McDonnell*, 418 U.S. 539 (1974); *Morrissey* v. *Brewer*, 408 U.S. 471 (1972).

Nor does the claim of the court below that gaming is merely a "privilege" (App. A, *infra*, p. 40) confine the reach of the Fourteenth Amendment to the edge of Nevada and no further. As this Court has said, ". . . the Court has fully and finally rejected the wooden distinction between 'rights' and 'privileges' that once seemed to govern the applicability of procedural due process rights." *Board of Regents* v. *Roth*, 408 U.S. 564, 571 (1972).[19]

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[18] The Fifth Circuit has put the point clearly. In characterizing its holding in *Hornsby* v. *Allen*, 326 F.2d 605 (5th Cir. 1964), that court said that *Hornsby* was important for "its insistence that state licensing of activities even so traditionally amenable to the widest discretion as the liquor business is subject to the minimal demands of the Fourteenth Amendment's due process . . . requirements, . . ." *Atlanta Bowling Center, Inc.* v. *Allen*, 389 F.2d 713, 715-716 (5th Cir. 1968).

[19] Similarly, the Fifth Circuit said in *Hornsby* v. *Allen*, 326 F.2d 605, 609 (5th Cir. 1964) in regard to liquor licensing, "Merely calling a liquor license a privilege does not free the municipal authorities from the due process requirements in licensing and allow them to exercise an uncontrolled discretion." The same is true of gaming. *See also Page* v. *Jackson*, 398 F .Supp. 263 (N.D.Ga. 1975); *Bell* v. *Burson*, 402 U.S. 535, 539 (1971) (due process pro-

Because the Fourteenth Amendment's commands are not silenced by state police power, as the Nevada Supreme Court contended, gaming regulation must meet federal constitutional standards. It is not sufficient to claim that the only constitutional due process clause involved in this case is that of the Nevada State constitution. (App. A, *infra*, p. 41.) The Fourteenth Amendment's due process clause cannot so facilely be by-passed.[20]

The effort to call gaming a privilege exempt from federal constitutional requirements squarely raises the question whether the Fourteenth Amendment applies to gaming, and thus, whether state regulation of gaming must meet the standards of the Fourteenth Amendment's due process clause, and not merely state constitutional standards.

III.

The Nevada Supreme Court's Interpretation of NRS 463.315 to Preclude Judicial Review of the Denial of Licenses by the Commission Contravenes Precedents Established by this Court.

The Nevada Supreme Court held that NRS 463.315 did not provide for judicial review of denials of licenses by the Gaming Commission (App. A, *infra*, p. 36), although, under Regulation 5.011(6), denial of a license prevented appellant from being employed

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tections adhere to license revocations when license is "essential in the pursuit of a livelihood").

[20] The statement of the Nevada Supreme Court on this is illuminating. It said: "It is apparent that if we were to recognize federal protections of this wholly privileged state enterprise, necessary state control would be substantially diminished and federal intrusion invited." (App. A, *infra*, p. 40.)

in any capacity in the gaming industry. The decision of the court below, and its reasoning, are at odds with this Court's decisions.

The Court has indicated that "Judicial review may indeed be required by the Constitution. *Ng Fung Ho* v. *White*, 259 U.S. 276." *Estep* v. *United States*, 327 U.S. 114, 120 (1946). When an owner claims that his property—here the appellant's continued employment—will be confiscated by administrative determination,

> ". . . the State must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts; otherwise, the order [of the administrative agency] is void because it is in conflict with the due process clause, Fourteenth Amendment . . ." *Ohio Valley Water Co.* v. *Ben Avon Borough*, 253 U.S. 287, 289 (1920).

See also Crowell v. *Benson*, 285 U.S. 22, 46 (1932), and *St. Joseph Stock Yards Co.* v. *United States*, 298 U.S. 38, 52 (1936). The interpretation of NRS 463.315 by the Nevada Supreme Court does not square with this principle.

This Court has repeatedly stated that when a statute is silent—as appellees claim the Nevada statute is—on the availability of judicial review, that silence cannot be presumed to authorize the preclusion of judicial review. *Data Processing Service* v. *Camp*, 397 U.S. 150 (1970); *Barlow* v. *Collins*, 397 U.S. 159, 166 (1970) (". . . judicial review of . . . administrative action is the rule, and nonreviewability an exception which must be demonstrated"). More than mere conclusionary reference to a legislative purpose to preclude judicial review is required when a statute is silent. *Abbott Laboratories, Inc.* v. *Gardner*, 387 U.S. 136, 141 (1967)

(". . . only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review").

IV.

Appellant's "Liberty" and "Property" Interests in His Job Are Entitled To Procedural Protections Guaranteed by the Due Process Clause of the Fourteenth Amendment.

In *Truax* v. *Raich,* 239 U.S. 33, 41 (1915), this Court stated that "the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure."[21]

Appellant's right to work in the common occupation of the community—gaming—is a property interest protected by the due process clause of the Fourteenth Amendment. *Board of Regents* v. *Roth,* 408 U.S. 564, 577 (1972); *Bishop* v. *Wood,* 426 U.S. 341 (1976).[22] Gaming is a legitimate occupation in Nevada, and appellant had a state-granted right to acquire, possess and

[21] *See also Acanfora* v. *Bd. of Ed. of Montgomery County,* 359 F. Supp. 843, 850 (D.Md. 1973), *affirmed,* 491 F.2d 498 (4th Cir.), *cert. denied,* 419 U.S. 836 (1974) (The sphere of protectable interests under the Fourteenth Amendment includes the "right to pursue a career", *citing Meyer* v. *Nebraska,* 262 U.S. 390, 399 (1923), where the Court said Fourteenth Amendment liberty included the freedom "to engage in any of the common occupations of life.")

[22] *See also Greene* v. *McElroy,* 360 U.S. 474 (1959) (protected property interest found when all employment in chosen field precluded by denial of security clearance); *Birkenfield* v. *United States,* 369 F.2d 491, 494 (3rd Cir. 1966) (due process applies where "the administrative body, as the regulator for an entire field of private employment, may entirely foreclose an individual from employment opportunities.")

protect it. This is a right firmly founded in state law. Article I, Section 1 of the Constitution of Nevada provides that "all men . . . have certain inalienable rights among which are those of enjoying and defending life and liberty, Acquiring, Possessing and Protecting property . . ." The Supreme Court of Nevada has said "The right to pursue a legitimate occupation is a fundamental right." *Doubles, Ltd.* v. *Gragson,* 91 Nev. 301, 535 P.2d 677 (1975). Appellant held a work permit, which gave him a "legitimate entitlement" to continue working. *Board of Regents* v. *Roth, supra.*

Appellant's interest in his reputation plus the damage to his employment opportunities resulting from both the Gaming Commission's finding him unsuitable for licensing and its statement about him, constitute a liberty interest protected by the Fourteenth Amendment. Reputation has long been recognized as a liberty interest. *See, e.g., Wisconsin* v. *Constantineau,* 400 U.S. 433 (1971); *Goss* v. *Lopez,* 419 U.S. 565 (1975). Although this Court has required that there be damage to reputation plus damage to another interest before there is infringement on a protected liberty interest, *Paul* v. *Davis,* 424 U.S. 693 (1976), this Court has specifically recognized "employment" as one of the "plus" interests that would result in due process protection. *Paul* v. *Davis, supra,* 424 U.S. at 701. Appellant's employment opportunities have been injured by the decision of the Gaming Commission, and this provides the "plus" to injury to reputation that *Paul* v. *Davis* requires.[23]

[23] *See also Catrone* v. *Massachusetts Racing Commission,* 404 F. Supp. 765, 770 (D.Mass. 1975), *vacated on other grounds,* 535 F.2d 669 (1st Cir. 1976), where exclusion from a racing track which damaged plaintiff's reputation and foreclosed employment possibilities at any other track was held to infringe a liberty interest.

Under the standards established by this Court, appellant has both a property and liberty interest to which the procedural protections of Fourteenth Amendment due process apply.[24] Although there is no fixed and immutable procedure required by due process, *Cafeteria and Restaurant Workers Union, Local 473, AFL-CIO* v. *McElroy,* 367 U.S. 886 (1961), this Court has said that at a minimum, due process requires that "deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Goss* v. *Lopez, supra,* 419 U.S. at 579, *quoting Mullane* v. *Central Hanover Trust Co.,* 339 U.S. 306, 313 (1950). Appellant was not afforded the procedural protections required by federal due process when such protected interests are at stake.

Appellant and his counsel did not have time to study the transcripts of the Board hearings. Appellant did not have time to obtain testimony from out-of-state witnesses. Because a continuance was not granted, appellant was denied "an opportunity to present his side of the story," *Goss* v. *Lopez, supra,* 419 U.S. at 581, and "a reasonable time" to prepare his case, *In re Messmer,* 52 W.2d 510, 326 P.2d 1004 (1958). Appellant claimed that the Gaming Commission Chairman was not impartial (Appellant's Answering Brief, pp. 34-36), further violating due process for which "an impartial decision maker is essential." *Goldberg* v. *Kelly,* 397 U.S. 254, 271 (1970). The Gaming Commis-

[24] In *Rachid* v. *Nevada,* Case No. A145535, Eighth Judicial District Court of Nevada, August 23, 1975, a different judge than that in appellant's case agreed that the right to work in the gaming industry constitutes a liberty and property interest to which the procedural protections of the Due Process Clause of the Fourteenth Amendment apply. The case has not been reversed.

sion's decision did not rest on substantial evidence. (Appellant's Answering Brief, pp. 37-38). Rather, it rested on hearsay statements which were neither mutually corroborative, nor contemporaneous, nor imbued with the special probative value found, for example, in an admission against interest. *See, e.g., Peters* v. *United States,* 187 Ct. Cls. 63, 73, 408 F.2d 719, 724 (1969); *Richardson* v. *Perales,* 402 U.S. 389 (1971). Denial of a continuance prevented appellant from exercising his fundamental right to confront and cross-examine witnesses against him, because there was no time to procure the witnesses' presence or to take their testimony out of the state.[25] This Court has "emphasized in recent years that procedural due process often requires confrontation and cross-examination of those whose words deprive a person of his livelihood." *Willner* v. *Committee on Character and Fitness,* 373 U.S. 96, 103 (1963). In short, the procedural protections for liberty and property interests required by due process, so that the opportunity to be heard occurs "at a meaningful time and in a meaningful manner," *Armstrong* v. *Manzo,* 380 U.S. 545, 552 (1955), were not afforded appellant.

[25] The Commission's power to take testimony is provided for in NRS § 463.140 (5) (App. G, *infra,* p. 61). This power, combined with the existence of the Uniform Foreign Depositions Act in any state where a non-Nevada witness was located, provide the necessary authority to procure the testimony of out-of-state witnesses.

CONCLUSION

The questions presented by this appeal are substantial and require and merit review by this Court. Probable jurisdiction should be noted.

Respectfully submitted,

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June, 1977

APPENDIX A

OPINION OF THE SUPREME COURT OF NEVADA, FEBRUARY 3, 1977

IN THE SUPREME COURT OF THE STATE OF NEVADA

STATE OF NEVADA, and
STATE OF NEVADA GAMING COMMISSION, *Appellants,*

vs.

FRANK ROSENTHAL, *Respondent.*

(FILED FEBRUARY 3, 1977)

Appeal from judgment; Eighth Judicial District Court, Clark County; Joseph S. Pavlikowski, Judge.

Reversed and decision of Gaming Commission reinstated.

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Opinion

By the Court, THOMPSON, J.:

This matter comes to us on direct appeal from a judgment of the Eighth Judicial District Court. That judgment declared certain licensing provisions of the Nevada Gaming Control Act unconstitutional for want of standards. It also found that the hearings before the Gaming Control Board and the Gaming Commission on Frank Rosenthal's application for a gaming license were conducted in such fashion as to violate federal constitutional proscriptions. Finally, the district court nullified the decision of the Gaming Commission that Frank Rosenthal is a person whose licensing would reflect or tend to reflect discredit upon the State of Nevada. For reasons hereafter stated we reverse that judgment in all respects and reinstate the decision of the Gaming Commission.

On January 23 and 24, 1975, the Gaming Commission held an investigative hearing to determine whether Frank Rosenthal was a key employee exercising significant influence over decisions of Argent Corporation, a holding

company, which then owned three major hotel-casinos in Clark County. Rosenthal was executive consultant to the Chairman of the Board of Argent Corporation. It is clear that he significantly influenced policy decisions concerning the conduct of gaming in the three hotel-casinos. Consequently, the Commission directed him to submit an application for a gaming license as a key employee. The application submitted by him described his duties "to consult with and to recommend to the Chairman; to advise, to administrate, delegate and supervise Corporate standards, procedures and policies."

The application first was considered by the Gaming Control Board at a hearing on January 14, 1976. The members of that Board voted unanimously to recommend to the Nevada Gaming Commission denial of the application.

On January 22, 1976, the Gaming Commission heard the matter and voted unanimously to deny the application for license. The Commission found: "The applicant is a person whose licensing by the State would reflect or tend to reflect discredit upon the State of Nevada by reason of: A) A North Carolina court finding of guilt for conspiracy to bribe an amateur athlete; B) Testimony of Mickey Bruce in Senate subcommittee hearings that applicant attempted to bribe him to throw outcome of 1960 Oregon-Michigan football game; C) Statements by police officers Dardis and Clode to Senate subcommittee and to Florida Racing Commission that applicant admitted he was corrupting public officials in return for protection; D) The applicant's being barred from race tracks and pari-mutual operations in the State of Florida."

On February 17, 1976, Rosenthal filed a petition for judicial review of the decision of the Commission. He premised his petition upon NRS 463.315, alleging that the decision of the Commission violated constitutional provisions, was in excess of its jurisdiction, made upon unlawful

procedures, was unsupported by any evidence, and was arbitrary and capricious and otherwise not in accordance with law. The petition did not assert that the licensing provisions of the Gaming Control Act were unconstitutional for want of standards. The district court, sua sponte, declared NRS 463.140 and 463.220 unconstitutional, and nullified the decision of the Gaming Commission.

1. It is established beyond question that gaming is a matter of privilege conferred by the State rather than a matter of right. The legislature has so declared. "Any license issued pursuant to this chapter shall be deemed to be a revocable privilege and no holder thereof shall be deemed to have acquired any vested rights therein or thereunder." NRS 463.130(2). In 1931 this court wrote: "We think the distinction drawn between a business of the latter character (liquor) and useful trades, occupations, or businesses, is substantial and necessary for the proper exercise of the police power of the state. Gaming as a calling or business is in the same class as the selling of intoxicating liquors in respect to deleterious tendency. The state may regulate or suppress it without interfering with any of those inherent rights of citizenship which it is the object of government to protect and secure." State Ex Rel. Grimes v. Board, 53 Nev. 364, 372, 373, 1 P.2d 570 (1931). Accord: Dunn v. Tax Commission, 67 Nev. 173, 187, 216 P.2d 985 (1950).

The licensing and control of gaming requires special knowledge and experience. Nev. Tax Com. v. Hicks, 73 Nev. 115, 119, 310 P.2d 852 (1957); Dunn v. Tax Commission, supra. In Hicks, this court observed "the risks to which the public is subjected by the legalizing of this otherwise unlawful activity are met solely by the manner in which licensing and control are carried out. The administrative responsibility is great." Id. at 120.

The legislature has been sensitive to these basic concepts. Members of the Gaming Control Board and Gaming

Commission must have special qualifications suited to the important duties with which they are charged. NRS 463.023; 463.040. Their powers are comprehensive. NRS 463.130-144. Court intrusion is limited. As we noted in Gaming Control Bd. v. Dist. Ct., 82 Nev. 38, 409 P.2d 974 (1966): "Any effort to obstruct the orderly administrative process provided by the Gaming Control Act casts serious doubt upon the ability of Nevada to control the privileged enterprise of gaming. Control does not exist if regulatory procedures are not allowed to operate. Courts owe fidelity to the legislative purpose. . . ." Id. at 40. Indeed, judicial review is confined to a final decision or order of the Commission and then only in specified instances.

With these basic principles in mind we turn to consider the issues of this appeal.

2. In the district court the State and the Gaming Commission moved to dismiss the petition for review for want of jurisdiction. We particularly note that the petition did not challenge the constitutionality of the licensing statutes. Had such challenge been made, a court would have to resolve it. Jurisdiction to decide that issue would exist since the courts are charged with the duty to decide such a question.

The petition for review was presented pursuant to NRS 463.315. That statute provides that "Any person aggrieved by a final decision or order of the commission made after hearing or rehearing by the commission pursuant to NRS 363.312 . . . may obtain a judicial review thereof in the district court. . . ." An examination of NRS 363.312 reveals its application only to disciplinary or other action against a licensee. It does not contemplate court review of the denial of a gaming license application. The sole responsibility for licensing is vested exclusively in the commission. NRS 463.220(6) so provides. "The Commission shall have full and absolute power and authority to deny any application (for a license) for any cause deemed reasonable by such Commission. . . ." In Nev. Tax Com. v. Hicks, 73 Nev. 115, 121, 310 P.2d 852 (1957), the court wrote: "It is not the province of the courts to decide what shall constitute suitability to engage in gambling in this state." In this regard the law has not changed since Hicks.

The legislature carefully has distinguished between persons who have been licensed and those who never have been licensed. In the former case judicial review of disciplinary action is provided; in the latter instance, it is not. This is a reasonable distinction since licensees possess property interests which those who have never been licensed do not have. The district court should have granted the motion to dismiss filed by the State and the Commission. Instead, that court declared the licensing provisions of the Gaming Control Act unconstitutional for want of standards, notwithstanding the absence of an allegation in the petition placing that question in issue. We proceed, therefore, to resolve that question.

3. The sections declared unconstitutional are NRS 463.140 and 463.220. In discussing this issue we do not decide whether licensing standards for the privileged enterprise of gaming must be expressed legislatively.[1] However, the legislature has expressed standards which have been implemented administratively. When one considers the interrelationship of the statutory standards, United States v. Polizzi, 500 F.2d 856 (9th Cir. 1974), and the regulations adopted administratively, any contention that there is an absence of appropriate standards must fail.

The basic standard is stated in NRS 463.130. Gaming shall be licensed and controlled "so as to protect the

[1] State ex rel. Grimes v. Board, 53 Nev. 364, 1 P.2d 570 (1931), may be read to mean that uniform rules and standards are not essential to state control of gaming since it is a privileged enterprise subject to total state regulation and suppression.

public health, safety, morals, good order and general welfare of the inhabitants of the State of Nevada, and to preserve the competitive economy and the policies of free competition of the State of Nevada." The statutes which were ruled unconstitutional by the court below simply state that gaming licenses shall be administered "for the protection of the public and in the public interest in accordance with the policy of this state," NRS 463.140, and that the Gaming Commission has full power to deny any application "for any cause deemed reasonable," NRS 463.220.

Administrative regulations have been adopted by the Commission pursuant to legislative authorization. NRS 463.150(1). Relevant to this case is Regulation 3.090. There, it is stated: "1. No license, registration, finding of suitability, or approval shall be granted unless and until the applicant has satisfied the Commission that the applicant: a) Is a person of good character, honesty, and integrity; b) Is a person whose background, reputation and associations will not result in adverse publicity for the State of Nevada and its gaming industry; and c) Has adequate business competence and experience for the role or position for which application is made." If we were to assume that the standards announced in NRS 643.140 and 643.220 [*sic*] are inadequate legislative expressions for the control of licensing in a privileged industry, the implementing regulation would serve to cure the defect since the "gaps" may be filled in administratively. Dunn v. Tax Commission, 67 Nev. 173, 216 P.2d 985 (1950).

Persons of ordinary intelligence surely can understand the intent and purpose of the standards expressed in the quoted regulation.

We wish, however, explicitly to state that the statutory standards alone are sufficient since "reasonable" action by the Commission is required in the light of the public interest involved. It is entirely appropriate to lodge such

wide discretion in the controlling administrative agency when a privileged enterprise is the subject of the legislative scheme. State ex rel. Grimes v. Board, 53 Nev. 364, 1 P.2d 570 (1931); Gragson v. Toco, 90 Nev. 131, 520 P.2d 616 (1974). We, therefore, find no basis for the ruling below that NRS 643.140 and NRS 643.220 [sic] are unconstitutional.

4. The district court also found that the applicant was denied procedural due process at the hearings before the Board and Commission. For reasons already stated, the court lacked jurisdiction to so rule. Notwithstanding this fact, the record refutes the court finding. The applicant and his two attorneys were present at each hearing. The applicant testified at each hearing and was given the opportunity to explain certain past alleged criminal activities and argue his position. Seventeen witnesses testified on his behalf, and seven letters attesting his good character and reputation were read into the record.

The district court, by ruling Rosenthal's due process had been violated because he had not been notified of the charges against him, misconceived the purpose of the hearings. They were not criminal proceedings in which Rosenthal had charges against him, but merely administrative proceedings wherein Rosenthal had the burden of proving his qualifications to receive a license. NRS 463.170. Further, the court mistakenly held that Rosenthal was denied his right to cross-examine apparently because the Board and Commission considered certain "hearsay" evidence consisting of the McClellan subcommittee transcript which was taken under oath, judicial papers from North Carolina, and investigative reports by the North Carolina State Bureau of Investigation. However, these hearings need not technically comport with strict rules of evidence, and hearsay can be accepted and considered by the agencies. NRS 463.312(13)(f); Citizens Bk. of Nev. v. Robison, 74 Nev. 91, 323 P.2d 705 (1958).

The district court ruling was premised upon the federal constitution. Although due process was not denied the applicant, it is worthwhile briefly to consider whether federal constitutional proscriptions are involved at all.

As before noted, gaming is a privilege conferred by the state and does not carry with it the rights inherent in useful trades and occupations. State ex rel. Grimes v. Board, 53 Nev. 364, 1 P.2d 570 (1931); Dunn v. Tax Com., 67 Nev. 173, 216 P.2d 985 (1950); NRS 463.130(2).

We view gaming as a matter reserved to the states within the meaning of the Tenth Amendment to the United States Constitution.[2] Within this context we find no room for federally protected constitutional rights. This distinctively state problem is to be governed, controlled and regulated by the state legislature and, to the extent the legislature decrees, by the Nevada Constitution. It is apparent that if we were to recognize federal protections of this wholly privileged state enterprise, necessary state control would be substantially diminished and federal intrusion invited.

In this opinion we heretofore have noted the distinction drawn by the legislature between persons who have been licensed and those who never have been licensed. Judicial review is provided for disciplinary action against licensees. It is not provided for one who has not been licensed.

With regard to licensees the legislature, in vague fashion, has recognized that a decision of the gaming commission may violate "constitutional provisions." NRS 463.315(11)(a). We use the term "vague" advisedly. The "constitutional provisions" which the legislature had in mind are not designated. This, along with the mandate of NRS 463.130(2) that any license is a revocable privilege without vested rights, makes it difficult to fathom legislative intent.

[2] U.S. Const. amend. X: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Our obligation is to construe the mentioned statutory provisions in such manner as to render them compatible with each other. Bodine v. Stinson, 85 Nev. 657, 461 P.2d 868 (1969). With this principle in mind we interpret NRS 463.315(11)(a) to refer only to the concept of procedural due process which is embraced within Nev. Const. art 1, § 8, no person shall "be deprived of life, liberty, or property without due process of law." Thus construed, the two statutes are compatible. The license which is declared to be a revocable privilege, may not be revoked without procedural due process first being afforded the licensee.

5. As a gaming employee, Frank Rosenthal was required to hold a valid work permit. NRS 463.335(3). The denial of his application for a gaming license as a key employee may have caused an automatic revocation of his work permit if NRS 463.595 and Regulation 5.011(6) are to be literally applied,[3] thus precluding his right to

[3] NRS 463.595. "1. Each officer, employee, director, partner, principal, trustee or direct or beneficial owner of any interest in any holding company or intermediary company, who the commission determines is, or is to become, engaged in the administration or supervision of, or any other involvement with, the gaming activities of a corporate licensee, must be found suitable therefor and may be required to be licensed by the commission, prior to such engagement.

"If any officer, employee, director, partner, principal, trustee or direct or beneficial owner required to be found suitable pursuant to subsection 1 fails to apply for a gaming license within 30 days after being requested so to do by the commission, or is not found suitable by the commission, or his suitability or license is rescinded after such finding by the commission, the holding company or intermediary company, or both, shall immediately remove such officer, employee, director, partner, principal, trustee or owner from any position wherein he is engaged in the administration or supervision of, or any other involvement with, the gaming activities of a corporate licensee. If the commission suspends the suitability or

work in a gaming establishment in any capacity. Revocation of a work permit is subject to judicial review, NRS 463.335(8), although the denial of his application to be licensed is not for reasons already stated.

The hearings before the Board and Commission were focused entirely upon the suitability of Rosenthal to be licensed as a key employee since he did significantly influence policy. His right to work in a capacity other than that of a key employee was not in issue at all. His suitability to work as a gaming employee has never been questioned by the gaming authorities of this state. To this extent, O'Callaghan v. District Court, 89 Nev. 33, 505 P.2d 1212 (1973), is in point. There, an employee's right to work as a gaming employee was revoked without prior notice and an opportunity to be heard. We ruled such action improper.[4] It follows that an automatic revocation of an employee's work permit also must fail for want of fairness.

We, therefore, find Regulation 5.011(6) to be inconsistent with the statutes providing for administrative

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license of any such officer, employee, director, partner, principal, trustee or owner, the holding company or intermediary company, or both, shall, immediately and for the duration of such suspension, suspend such person from performing any duties wherein he is engaged in administration or supervision of the gaming activities of the corporate licensee and from any other involvement therewith."

Regulation 5.011(6): "Employing in any capacity in or about any licensed establishment (including hotel, restaurant or bar facilities, as well as the gaming casino) any person who has been denied a state gaming license on the grounds of unsuitability or who has refused to submit an application for licensing as a key employee when so requested by the commission, or whose past activities and reputation would tend to bring discredit on the industry or the State of Nevada."

[4] Since the O'Callaghan decision NRS 463.335 was amended to provide for judicial review. See: 1975 Stats., p. 686.

and judicial review of the revocation of a work permit. The regulation cannot stand. Cashman v. Nevada Gaming Comm'n, 91 Nev. 424, 538 P.2d 158 (1975).

A portion of NRS 463.595 likewise may be read to require automatic revocation of a work permit held by one found unsuitable to be licensed by reason of the oft repeated phrase in the statute "or any other involvement with the gaming activities of a corporate licensee." An employee with a work permit is involved with the gaming activities of a corporate licensee. This portion of the statute does not square with the statutes providing for administrative and judicial review of the revocation of a work permit and cannot stand.

A reasonable distinction exists between the status of one who seeks to acquire a license, and the status of one who possesses a work permit as a gaming employee. The former does not have existing privileges, but is attempting to acquire them. The latter does have an existing privilege, and is entitled to receive notice and a hearing before his privilege to work as a gaming employee can be nullified.

Therefore, we conclude that Frank Rosenthal may continue to enjoy a work permit as a gaming employee. Our conclusion, however, shall not be construed to preclude further action by the gaming authorities to revoke his work permit should they deem such action advisable.

The judgment of the district court is reversed, and the decision of the Nevada Gaming Commission is reinstated. We particularly point to the fact that this opinion rests solely upon the State Gaming Control Act and Nevada

case precedent. As we view this case, a federal question is not present.

/s/ THOMPSON, J.
THOMPSON

We concur:

/s/ BATJER, C.J.
Batjer

/s/ ZENOFF, J.
Zenoff

/s/ MOWBRAY, J.
Mowbray

/s/ GUNDERSON, J.
Gunderson

Attest: A full, true and Correct Copy.

C. R. DAVENPORT,
Clerk of the Supreme Court.

/s/ By JUDITH McCULLOCH, Deputy

APPENDIX B

JUDGMENT OF THE SUPREME COURT OF NEVADA, ENTERED FEBRUARY 3, 1977 AND JUDGMENT ENTERED MARCH 9, 1977

IN THE SUPREME COURT OF THE STATE OF NEVADA

CLERK'S CERTIFICATE

STATE OF NEVADA, ss.

I, C. R. Davenport, the duly appointed and qualified Clerk of the Supreme Court of said State of Nevada, do hereby certify that the following is a full, true and correct copy of the Judgment in the matter of State v. Rosenthal, No. 9301.

Judgment

The Court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, to the effect: "The Judgment of the district court is reversed, and the decision of the Nevada Gaming Commission is reinstated."

Judgment, as quoted above, entered this 3rd day of February, 1977.

Judgment

The Court being fully advised in the premises and the law, is now ordered, adjudged and decreed, to the effect: "Rehearing denied."

Judgment, as quoted above, entered this 9th day of March, 1977.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court, at my office in Carson City, Nevada, this 17th day of March, 1977.

C. R. DAVENPORT
Clerk of Supreme Court
of the State of Nevada

By JUDITH MCCULLOCH, Deputy

APPENDIX C

ORDER OF THE SUPREME COURT OF NEVADA DENYING APPELLANT'S PETITION FOR REHEARING MARCH 9, 1977

IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 9301

STATE OF NEVADA and
STATE OF NEVADA GAMING COMMISSION,
Appellants,

vs.

FRANK ROSENTHAL, *Respondent.*

(FILED MARCH 9, 1977)

Order Denying Rehearing

Rehearing denied.

It is so ORDERED.

/s/ BATJER, C.J.
Batjer

/s/ ZENOFF, J.
Zenoff

/s/ MOWBRAY, J.
Mowbray

/s/ THOMPSON, J.
Thompson

/s/ GUNDERSON, J.
Gunderson

APPENDIX D

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES, FILED MAY 10, 1977

IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 9301

STATE OF NEVADA, and
STATE OF NEVADA GAMING COMMISSION,
Appellants, Appellees

v.

FRANK ROSENTHAL, *Respondent, Appellant*

(FILED MAY 10, 1977)

Notice of Appeal to the Supreme Court of the United States

Notice is hereby given that Frank Rosenthal, the above-named Respondent in Case No. 9301, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Nevada, issued on March 9, 1977, denying reconsideration of its decision of February 3, 1977 in the above-captioned action.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

/s/ By ERWIN N. GRISWOLD
ERWIN N. GRISWOLD
1100 Connecticut Avenue, N.W.
Washington, D.C. 20036

Counsel for Appellant

APPENDIX E

OPINION, JUDGMENT AND ORDER OF THE EIGHTH JUDICIAL DISTRICT COURT OF NEVADA IN AND FOR THE COUNTY OF CLARK, DECEMBER 2, 1976

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK

FRANK ROSENTHAL, *Petitioner,*

vs.

STATE OF NEVADA and
STATE OF NEVADA GAMING COMMISSION,
Respondents.

(FILED DECEMBER 2, 1976)

Findings of Fact, Conclusions of Law and Judgment

SUMMARY

Petitioner was initially employed by a gaming casino in 1971 when he went to work at the Stardust Hotel in a capacity of floorman. As a result of his diligence and acquired expertise, Petitioner rose through the ranks of casino positions of responsibility until he attained the title of Director of Nevada Operations for the Argent Corporation, the parent company of the Stardust. He attained this position in or about the Month of September of 1974. In January of 1975, the Nevada Gaming Commission indicated its desire that the Petitioner subject himself to investigation by the Nevada Gaming Control Board and ultimately for a finding of suitability to be licensed as a key employee. The Petitioner remained in said executive capacity throughout the year of 1975 and during that year, without incident nor criticism concerning his capabilities or job performance as a casino executive from the aforesaid Nevada Gaming entities. On or about July 18, 1975, Petitioner submitted his application to the State of Nevada Gaming Control Board to be found suitable for licensing as a key employee.

A hearing was conducted on or about January 15, 1976, wherein the Nevada Gaming Control Board unanimously

recommended to the Nevada Gaming Commission that Petitioner's application be denied.

Following a "hearing" on January 22, 1976, the Nevada Gaming Commission, by written decision, dated January 26, 1976, denied Petitioner's application.

The application was denied upon the grounds that the Petitioner is a person whose licensing by the State would reflect or tend to reflect discredit upon the State of Nevada.

The decision of the Nevada Gaming Commission became effective on January 28, 1976, and Petitioner's employment as the Director of Nevada Operations for Argent Corporation was terminated immediately thereafter.

On February 17, 1976, a Petition for Judicial Review was filed challenging, *inter alia,* that the Petitioner's constitutional rights guaranteed by the Due Process Clause of the Fourteenth Amendment of the United States Constitution were violated since the statutory framework under which the Nevada Gaming Control Board and the Nevada Gaming Commission were to base their decisions lacked standards and thus permitted the Nevada Gaming Control Board and the Nevada Gaming Commission to act in an arbitrary and capricious manner.

It should be noted that the provisions of N.R.S. 463.140 and 463.220 grant to the Nevada Gaming Control Board and the Nevada Gaming Commission full and absolute power and authority to recommend the denial of any application for any cause deemed reasonable by either the Board or the Commission. No additional statutory or regulatory standard is set forth with any particularity upon which the individual members of the Nevada Gaming Control Board or Nevada Gaming Commission could base their judgment, or upon which the Petitioner might rely upon in making the determination as to whether to

go forward with the application for licensing as a key employee.[1]

The Petitioner also complained that his hearing was void of due process in that certain basic constitutional rights were not afforded to him in the presentation of evidence, and that in fact the decision of the Nevada Gaming Control Board and of the Nevada Gaming Commission was arbitrary and capricious and against the weight of the evidence.

Because the Court is of the opinion that the first ground to-wit: that the subject gaming statutes are facially unconstitutional (being wholly without rational basis and essentially arbitrary, and containing no standard of broad fairness and no standard which would avoid gross inequity) the Court deems the basis of the hearing to be founded on a premise which is violative of the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

As urged by the Respondents, the Court agrees that the Nevada Gaming Control Board and the Nevada Gaming Commission have been granted broad powers to control our State's primary industry. Such powers, however, cannot be extrapolated to an extent that would allow arbitrary and capricious statutes and regulations to be arbitrarily and capriciously applied. The determination as to whether or not to license the Petitioner is part of an adjudicative process. Thus, when the Nevada Gaming Commission grants or denies a license it is an adjudication that the applicant has either satisfactorily or un-

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[1] It should be noted that when one in Petitioner's place is not found suitable for licensing after placing himself before the Nevada Gaming Control Board and the Nevada Gaming Commission, that person is subject to revocation of his work card because of the finding of unsuitability (N.R.S. 403.337) [sic] and is precluded from having any economic relationship with a gaming entity. (Reg. 16.440).

satisfactorily complied with the prescribed standards for the award or denial of that license.

Since licensing consists in the determination of factual issues and the application of legal criteria to them—a judicial act—the fundamental requirements of Due Process are applicable to it. Certainly, *at the forefront of Due Process is the right to know what standards have been prescribed.*

This Court finds that no ascertainable standards have been established by the Nevada Legislature, nor by the Nevada Gaming Commission in its enactment of regulations. Therefore, an applicant cannot intelligently decide whether to seek to qualify for a license. Furthermore, no standards or regulations have been enacted which would assure an applicant that the Nevada Gaming Control Board and the Nevada Gaming Commission can make determinations which are not arbitrary and capricious, a situation, such as that in the instant case, which invited abuse.

The rationale of the foregoing discussion is clearly articulated in *Hornsby* v. *Allen,* 326 F.2d 605 (5th Cir., 1964), wherein an unsuccessful applicant for a retail liquor store operator's license had complaints similar to those of the Petitioner herein. The Court, in reversing the District Court, concluded that if no ascertainable standards existed "by which an applicant can intelligently seek to qualify for a license, then the Court must enjoin the denial of licenses under the prevailing system, and until a legal standard is established and procedural due process provided. . . ." 326 F.2d at 612. The *Hornsby* case has recently been cited with approval by two other federal courts. In *White* v. *Houghton,* 530 F.2d 754 (7th Cir., 1976), the Court held that an administrator cannot vest himself and his staff with unfettered discretion in making determinations of eligibility based upon their own unwritten personal standards since the same was clearly

violative of due process. The requirements of due process include a determination of the issue according to articulated standards. In *Baker-Chapret* [sic] v. *Cammett,* 406 F.Supp. 1134 (D.N.H. 1976), the same criteria is stated, notwithstanding the fact that the defendants therein argued as did the Respondents herein, that gaming entities need a flexibility, which the imposition of standards may rigidify. Due Process requires, commented the Court, that we rule by law and not fiat. The absence of standards creates a void in which malice, vindictiveness, intolerance or prejudice can fester. Efficiency and efficacy do not outweigh the individual's interest in being protected from arbitrary and capricious decision making.[2]

The Court is also of the opinion that the manner in which the hearing was conducted denied Petitioner ROSENTHAL Due Process since he was not notified of the charges against him with sufficient notice to oppose said charges, *Opp Cotton Mills* v. *Administrator,* 312 U.S. 126 (1941); that he did not know the claims which were lodged against him by the State since much of the proceedings relied on confidential material, *Morgan* v. *United States,* 304 U.S. 1 (1938); he was not given an opportunity to present evidence to support his contentions, since subpoena power does not exist extra-territorily; he was not given the opportunity to cross-examine witnesses, *Reilly* v. *Pinkus,* 338 U.S. 269 (1949); and this Court is also aware and takes judicial notice thereof, that persons in a similar position to MR. ROSENTHAL have been licensed under similar circumstances constituting an additional denial of equal protection of the law, *Niemotko* v. *Maryland,* 340 US. 268 (1951).

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[2] Even in an industry such as gaming, the Petitioner herein has been arbitrarily denied the right to pursue a specific type of private employment and to follow his chosen profession. This right is embodied within the Fourteenth Amendment's concept of "liberty" and "property". *Truax* v. *Raich,* 239 U.S. 33 (1918).

In consideration of the foregoing, the Court finds as follows:

1. Petitioner FRANK ROSENTHAL was employed by the Argent Corporation in the capacity of Director of Nevada Operations from on or about September of 1974, to on or about February of 1976.

2. That on or about January of 1975, the Nevada Gaming Commission indicated its desire that the Petitioner FRANK ROSENTHAL subject himself to investigation by the Nevada Gaming Control Board and ultimately for a finding of suitability to be licensed as a key employee.

3. That on or about July 18, 1975, Petitioner FRANK ROSENTHAL submitted his application to the State of Nevada Gaming Control Board to be found suitable for licensing as a key employee.

4. The Petitioner FRANK ROSENTHAL remained in his executive capacity throughout the year of 1975 and up until the time of his termination from employment, as is hereinafter described, without incident nor criticism concerning his capabilities or job performance as a casino executive from the aforesaid Nevada Gaming entities.

5. That a hearing was conducted on or about January 15, 1976, wherein the Nevada Gaming Control Board unanimously recommended to the Nevada Gaming Commission that Petitioner's application be denied.

6. Following a "hearing"on January 22, 1976, the Nevada Gaming Commission, by written decision, dated January 26, 1976, denied Petitioner's application.

7. The decision of the Nevada Gaming Commission became effective on January 28, 1976, and Petitioner's employment with the Argent Corporation was terminated.

8. That subsequent to Petitioner's license denial, he has been effectively excluded from employment in his chosen profession.

9. That the hearings conducted by the Nevada Gaming Control Board and the Nevada Gaming Commission to determine the suitability of Petitioner to be licensed as a key employee were void of any ascertainable standards, upon which the Petitioner could rely, or upon which the Nevada Gaming Control Board or Nevada Gaming Commission could make a judgment which would comport with the mandates of the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

10. That the hearings conducted by the Nevada Gaming Control Board and the Nevada Gaming Commission were conducted in a manner which denied Petitioner of his rights guaranteed under the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

Judgment

It is the Judgment of this Court that Nevada Revised Statutes 463.140 and 463.220 when enforced, are void of standards upon which the Petitioner could rely, or upon which the Nevada Gaming Control Board or Nevada Gaming Commission could make a judgment which would comport with the mandates of the Due Process Clause of the Fourteenth Amendment of the United States Constitution and, therefore, said statutes are deemed unconstitutional.

It is the further Judgment of this Court that the hearings as conducted were violative of the Petitioner's rights guaranteed by the Due Process Clause of the Fourteenth Amendment of the United States Constitution and, if in the future such further hearing may be had, the hearing must be conducted in a way which comports with the Findings and Conclusion of Law as hereinbefore stated.

/s/ JOSEPH S. PAVLIKOWSKI,
Joseph S. Pavlikowski,
District Court Judge

Order

IT IS THE ORDER OF THIS COURT that the Respondents herein, their agents, servants and employees, are enjoined from enforcing N.R.S. 463.140 and 463.220 until a standard is established consistent with the Due Process Clause as stated in the aforesaid Findings of Fact, Conclusions of Law and Judgment.

IT IS THE FURTHER ORDER of this Court that if said future hearings be conducted regarding the Petitioner herein that said hearings be conducted in a manner which comports with the procedural protections afforded by the Due Process Clause.

IT IS THE FURTHER ORDER OF THIS COURT that the Petitioner, FRANK ROSENTHAL, be forthwith reinstated in a like or comparable position that he held with the Argent Corporation at the time of his termination from such employment.

IT IS FURTHER ORDERED that the Respondents herein, their agents, servants and employees, are enjoined from bringing disciplinary action against the employer of Petitioner FRANK ROSENTHAL, so long as said Petitioner comports and complies with all the statutes and regulations of the State of Nevada, consistent with this opinion.

DATED this 2nd day of December, 1976.

/s/ JOSEPH S. PAVLIKOWSKI,
Joseph S. Pavlikowski,
District Court Judge

APPENDIX F

AMENDED JUDGMENT AND ORDER OF THE EIGHTH JUDICIAL COURT OF NEVADA IN AND FOR THE COUNTY OF CLARK. DECEMBER 3, 1976

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK

AMENDED JUDGMENT AND ORDER

FRANK ROSENTHAL, *Petitioner,*

vs.

STATE OF NEVADA and
STATE OF NEVADA GAMING COMMISSION,
Respondents.

(FILED DECEMBER 3, 1976)

Amended Judgment

It is the Judgment of this Court that Nevada Revised Statutes 463.140 and 463.220 when enforced, are void of standards upon which the Petitioner could rely, or upon which the Nevada Gaming Control Board or Nevada Gaming Commission could make a judgment which would comport with the mandates of the Due Process Clause of the Fourteenth Amendment of the United States Constitution and, therefore, said statutes are deemed unconstitutional as applied to Petitioner FRANK ROSENTHAL.

It is the further Judgment of this Court that the hearings as conducted were violative of the Petitioner's rights guaranteed by the Due Process Clause of the Fourteenth Amendment of the United States Constitution and, if in the future such further hearing may be had, the hearing must be conducted in a way which comports with the Findings and Conclusion of Law as hereinbefore stated.

/s/ JOSEPH S. PAVLIKOWSKI,
Joseph S. Pavlikowski,
District Court Judge

Amended Order

IT IS THE ORDER OF THIS COURT that the Respondents herein, their agents, servants and employees are enjoined from enforcing N.R.S. 463.140 and 463.220 against Petitioner FRANK ROSENTHAL until a standard is established consistent with the Due Process Clause as stated in aforesaid Findings of Fact, Conclusions of Law and Judgment.

IT IS THE FURTHER ORDER OF THIS COURT that if said future hearings be conducted concerning the Petitioner herein that said hearing be conducted in a manner which comports with the procedural protections afforded by the Due Process Clause.

IT IS THE FURTHER ORDER OF THIS COURT that the Petitioner, FRANK ROSENTHAL, be forthwith reinstated in a like or comparable position that he held with the Argent Corporation at the time of his termination from such employment.

IT IS FURTHER ORDERED that the Respondents herein, their agents, servants and employees, are enjoined from bringing disciplinary action against the employer of Petitioner FRANK ROSENTHAL, so long as said Petitioner comports and complies with all the Statutes and regulations of the State of Nevada, consistent with this opinion.

DATED this 3rd day of December, 1976.

/s/ JOSEPH S. PAVLIKOWSKI
Joseph S. Pavlikowski,
District Court Judge

APPENDIX G

STATUTES AND REGULATION

NRS 463.140(5)
NRS 463.170(4)
NRS 463.335
NRS 463.595
GAMING CONTROL REGULATION 5.011(6)

Nevada Revised Statutes, Section 463.140(5), at page 16126.

NRS 463.140 POWERS AND DUTIES OF BOARD; COMMISSION.

5. The board and the commission or any member thereof shall each have full power and authority to issue subpenas [*sic*] and compel the attendance of witnesses at any place within this state, to administer oaths and to require testimony under oath. Any process or notice may be served in the manner provided for service of process and notices in civil actions. The board or the commission may pay such transportation and other expenses of witnesses as it may deem reasonable and proper. Any person making false oath in any matter before either the board or commission shall be guilty of perjury. The board and commission or any member thereof may appoint hearing examiners who shall have full power and authority to administer oaths and receive evidence and testimony under oath.

Nevada Revised Statutes, Section 463.170(4), at page 16225.

463.170 QUALIFICATIONS FOR STATE LICENSE.

4. The commission may, by regulation, limit the number of persons who may be financially interested and the nature of such interest in any corporation or other organization or association licensed under this chapter, and establish such other qualifications for licenses as they may, in their uncontrolled discretion, deem to be in the public interest.

Nevada Revised Statutes, Section 463.335, at pages 16241-16243.

463.335 GAMING EMPLOYEES REQUIRED TO HOLD WORK PERMITS; HEARINGS AND REVIEW; CONFIDENTIAL RECORDS.

1. As used in this section:

(a) "Gaming employee" means any person connected directly with the operation of a nonrestricted establishment, and includes without limitation:

(1) Boxmen;

(2) Cashiers;

(3) Dealers;

(4) Floormen;

(5) Hosts or other persons empowered to extend credit or complimentary services;

(6) Keno runners;

(7) Keno writers;

(8) Machine mechanics;

(9) Security personnel;

(10) Shift or pit bosses;

(11) Shills; and

(12) Supervisors or managers.

"Gaming employee" does not include bartenders, cocktail waitresses or other persons engaged in preparing or serving food or beverages.

(b) "Nonrestricted establishment" means any establishment except one in which slot machines only are operated incidentally to some other primary business of the licensee.

(c) "Temporary work permit" means a work permit which is valid only for a period not to exceed 30 days from its date of issue and is not renewable.

(d) "Work permit" means any card, certificate or permit issued by the board or by a county or city licensing authority, whether denominated as a work permit, registration card or otherwise, authorizing the employment of the holder as a gaming employee.

2. The legislature finds that, to protect and promote the public health, safety, morals, good order and general welfare of the inhabitants of the State of Nevada and to carry out the policy declared in NRS 463.130, it is necessary that the board:

(a) Ascertain and keep itself informed of the identity, prior activities and present location of all gaming employees in the State of Nevada; and

(b) Maintain confidential records of such information.

3. No person may be employed as a gaming employee unless he is the holder of:

(a) A valid work permit issued in accordance with the applicable ordinances or regulations of the county or city in which his duties are performed; or

(b) If no work permit is required by either such county or such city, a work permit issued by the board.

4. Whenever any person applies for the issuance or renewal of a work permit, the county or city officer or employee to whom such application is made shall within 24 hours mail or deliver a copy thereof to the board, and may at the discretion of the county or city licensing authority issue a temporary work permit. If within 30 days after receipt by the board of the copy of the application, the board has not notified the county or city licensing authority of any objection, such authority may in its discretion issue or deny a work permit to the applicant. Any holder of a work permit must obtain renewal of the permit from the issuing agency within 10 days following any change of place of employment.

5. If the board within the 30-day period notifies the county or city licensing authority that the board objects to the granting of a work permit to the applicant, such authority shall deny the work permit and shall immediately revoke and repossess any temporary work permit which it may have issued.

6. Application for a work permit, valid wherever a work permit is not required by any county or city licensing authority, may be made to the board, and may be granted or denied for any cause deemed reasonable by the board.

7. Any person whose application for a work permit has been denied because of an objection by the board or whose application for a work permit has been denied by the board may apply to the board for a hearing. At such hearing, the board or any designated member of the board or an examiner appointed by the board shall take any testimony deemed necessary. After such hearing the board shall review the testimony taken and any other evidence in its files, and shall within 30 days from the date of the hearing announce its decision sustaining or reversing the denial of the work permit or the objection to issuance of a work permit. Such decision may be made upon any ground deemed reasonable by the board, and shall be conclusive unless reversed as provided in subsection 8.

8. Any applicant aggrieved by the decision of the board may, within 15 days after the announcement of the decision, apply in writing to the commission for review of the decision. Such review shall be limited to the record, any testimony submitted and the files in the case. The commission may sustain or reverse the board's decision. The decision of the commission shall be subject to judicial review pursuant to NRS 463.315.

9. All records acquired or compiled by the board or commission relating to any application made pursuant to this section are confidential and no part thereof may be disclosed except in the proper administration of this chapter or to an authorized law enforcement agency. All lists of persons to whom work permits have been issued or denied and all records of the names or identity of persons engaged in the gaming industry in this state are confidential and shall not be disclosed except in the proper administration of this chapter or to an authorized law enforcement agency.

Nevada Revised Statutes, Section 463.595, at pages 16264-16265.

463.595 SUITABILITY, LICENSING OF CERTAIN OFFICERS, EMPLOYEES OF HOLDING, INTERMEDIARY COMPANY; SUSPENSION OF SUITABILITY, LICENSE BY COMMISSION.

1. Each officer, employee, director, partner, principal, trustee or direct or beneficial owner of any interest in any holding company or intermediary company, who the commission determines is, or is to become, engaged in the administration or supervision of, or any other involvement with, the gaming activities of a corporate licensee, must be found suitable therefor and may be required to be licensed by the commission, prior to such engagement.

2. If any officer, employee, director, partner, principal, trustee or direct or beneficial owner required to be found suitable pursuant to subsection 1 fails to apply for a gaming license within 30 days after being requested so to do by the commission, or is not found suitable by the commission, or his suitability or license is rescinded after such finding by the commission, the holding company or intermediary company, or both, shall immediately remove such officer, employee, director, partner, principal, trustee or owner from any position wherein he is engaged in the administration or supervision of, or any other involvement with, the gaming activities of a corporate licensee. If the commission suspends the suitability or license of any such officer, employee, director, partner, principal, trustee or owner, the holding company or intermediary company, or both, shall, immediately and for the duration of such suspension, suspend such person from performing any duties wherein he is engaged in administration or supervision of the gaming activities of the corporate licensee and from any other involvement therewith.

Gaming Control Commission Regulation 5.011(6)

GAMING CONTROL REGULATION 5.011 (6)

5.011 Grounds for disciplinary action. The board and the commission deem that any activity on the part of any licensee, his agents or employees which is inimical to the public health, safety, morals, good order and general welfare of the people of the State of Nevada, or which would reflect or tend to reflect discredit upon the State of Nevada or the gaming industry is operating in an unsuitable manner and shall be grounds for disciplinary action by the board and the commission in accordance with the Nevada Gaming Control Act and the regulations of the board and the commission. Without limiting the generality of the foregoing, the following acts or omissions may be determined to be unsuitable methods of operation:

• • • • • • • • • •

6. Employing in any capacity in or about any licensed establishment (including hotel, restaurant or bar facilities, as well as the gaming casino) any person who has been denied a state gaming license on the grounds of unsuitability, or whose past activities and reputation would tend to bring discredit on the industry of the State of Nevada.

No. 76-1714

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

FRANK ROSENTHAL, *Appellant*,

v.

STATE OF NEVADA and
STATE OF NEVADA GAMING COMMISSION,
Appellees.

On Appeal from the Supreme Court of Nevada

MOTION TO DISMISS OR AFFIRM

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IN THE

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OCTOBER TERM, 1976

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FRANK ROSENTHAL, *Appellant,*

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STATE OF NEVADA and
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Appellees.

On Appeal from the Supreme Court of Nevada

MOTION TO DISMISS OR AFFIRM

STATEMENT OF THE CASE

This case involves a decision by the State of Nevada to deny a gaming license to an admitted felon. It is therefore understandable why appellant, who raises procedural challenges, nevertheless chooses to ignore the full record below. Through a careful examination of those proceedings, the State of Nevada will demonstrate that appellant presents no substantial federal questions for review.

The gaming laws of Nevada are administered by two agencies created by the legislature, the Nevada Gaming Commission (hereinafter "the Commission") and the Nevada Gaming Control Board (hereinafter "the Board"). These agencies are charged with enforcing the declared public policy of the State which requires licensing "to protect the public health, safety, morals, good order and general welfare of the inhabitants of the State of Nevada. . . ." N.R.S. 463.130. The Board is composed of three full-time members and employs a large staff of investigators, analysts, accountants and other experts to monitor and police, on a day-to-day basis, all gaming operations of the State.[1] The Commission is a five-member body, also charged with administering the State's gaming laws, which meets at least monthly and in certain matters is responsible for acting upon recommendations of the Board. One such area is the granting of gaming licenses, including the granting of licenses to key employees, those "engaged in the administration or supervision of . . . the gaming activities of a corporate licensee. . . ." N.R.S. 463.595(1).[2]

---

[1] The magnitude of the Board's responsibilities in overseeing the State's largest industry cannot be understated: In 1974, for example, 47 percent of all State revenues were derived from licensed gambling. *Gambling in America*, Final Report of the Commission on the Review of the National Policy Toward Gambling (1976), p. 81.

[2] N.R.S. 463.595(1) requires that employees "engaged in the administration or supervision of . . . the gaming activities of a corporate licensee . . ." must themselves procure gaming licenses. The purpose of this provision is to prevent unqualified or undesirable individuals from infiltrating the gaming industry through the cover of a corporate license. This provision is part of the comprehensive legislative scheme designed to insure the continuing integrity of gaming in Nevada.

On January 23, 1975, the Commision convened a hearing focusing on appellant's status as an employee of Argent Corporation, an organization which, at the time, owned and managed four licensed casinos in Las Vegas. On the basis of this hearing, it was determined that appellant, as a "key employee" of Argent, was required to obtain a gaming license. N.R.S. 463.595(2) requires a key employee to file an application within 30 days of such a finding. Appellant, however, requested and was granted an extension of this filing deadline in order to resolve two pending federal indictments prior to the submission of his application for a gaming license. T.C.H., Jan. 23, 1975, pp. 143-152; T.C.H., Jan. 24, 1975, pp. 1-4, 18-19.[3]

In July of 1975, appellant filed an application for a Nevada gaming license with the Board. Pursuant to state law and appellant's authorization,[4] the Board conducted an investigation into appellant's background.

Upon completion of the Board's investigation, a public hearing was held by the Board on his license application. Appellant conveniently neglects to apprise this Court of several salient features of this hearing:

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[3] "T.C.H." refers to Transcript of Commission Hearing and "T.B.H." refers to Transcript of Board Hearing, followed by the appropriate date and page number. These transcripts are included in the certified record appellees have transmitted to this Court.

[4] Appellant's application acknowledged that the Board would "cause an investigation to be made of my background, both personal and financial. . . ." Appellant authorized "any and all persons having information concerning me, either of public record or otherwise, to furnish it to a duly authorized agent" of the Board.

—Appellant was represented by two attorneys. T.B.H., Jan. 14, 1974, p. 2.

—It was a public hearing. *Id.*, p. 118.

—At appellant's request, fifteen individuals appeared before the Board and under questioning from appellant's counsel and Board members testified on his behalf. *Id.*, pp. ii-iii.

—Seven letters attesting to appellant's character were introduced and received into evidence. *Id.*, pp. iii-iv.

—Three Board employees were subpoenaed by appellant and testified at his request. *Id.*, pp. 67, 72, 74.

—Appellant testified on his own behalf. *Id.*, pp. 77-269.

—A certified transcript of the proceedings was made. *Id.*, p. 279.

During the course of the hearing appellant was given the opportunity to comment on or otherwise explain each of the sixteen arrests he listed on his application. *Id.*, pp. 89, 90-126, 156-160, 180-216, 221-225, 265-267. Moreover, appellant was given the same opportunity with respect to other evidence uncovered by the Board's investigation. For instance, extensive testimony was received from appellant pertaining to his North Carolina conviction for conspiracy to bribe a college basketball player at the 1961 NCAA championship tournament. *Id.*, pp. 180-209. The Board heard and considered appellant's response to sworn testimony given before a United States Senate Subcommittee alleging that appellant attempted to bribe one "Mickey" Bruce to throw a 1960 college football game between the University of Michigan and the

University of Oregon. *Id.*, pp. 136-156, 169-176. The Board heard and considered appellant's response to other sworn testimony given before a United States Senate Subcommittee and the Florida Racing Commission that appellant was allegedly corrupting public officials. The Board noted and allowed appellant the opportunity to comment on the fact that appellant's horse racing license was revoked by the State of Florida and that appellant was barred from all Florida racetracks. *Id.*, pp. 91-102, 115-126, 134-136. In short, appellant was consistently afforded the opportunity to testify with respect to each item considered by the Board.

At the conclusion of this hearing, the Board voted unanimously to recommend denial of appellant's application for a gaming license. The Board stated four specific grounds for denying the request:

> [T]he applicant is a person whose licensing by the state would reflect or tend to reflect discredit upon the State of Nevada by reason of A, a North Carolina court finding of guilt for conspiracy to bribe an amateur athlete; B, the testimony of one Mickey Bruce in Senate subcommittee hearings that the applicant attempted to bribe him to throw the outcome of the 1960 Oregon-Michigan football game; C, statements by police officers Dardis and Clode to a Senate subcommittee and the Florida Racing Commission that the applicant admitted he was corrupting public officials in return for protection; and D, the applicant's being barred from racetracks and parimutuel operations in the State of Florida.

N.R.S. 463.220(4) provides that the Commission shall consider any recommendation of the Board that a par-

ticular license application be denied. Three days prior to the Commission's scheduled hearing, appellant requested a continuance to allow him to secure, among other things, the "presence" of Mickey Bruce (the football player who testified before the Senate Subcommittee that appellant had attempted to bribe him). The continuance was denied. Prior to the start of the hearing before the Commission appellant's attorney was given the opportunity to again request and argue for a continuance. The Chairman of the Commission denied the request, noting, among other things, that Mr. Bruce resided in California, that he had indicated orally and in writing to Board investigators that he would not, as a result of concern for his safety, appear in Nevada, and that no legal process of the State could compel his attendance.[4] T.C.H., Jan. 22, 1976, pp. 2-38.

Prior to the start of the actual proceeding, the Chairman recessed the meeting to be sure that two Commissioners who had not received the transcript of the Board hearing when it was first ready the day before would have the opportunity to read it. *Id.*, pp. 42-43. The Commission had already made arrangements to have the transcript hand-delivered to appellant's counsel the day it was ready. *Id.*, p. 6.

At the hearing before the Commission, appellant was again represented by counsel, called witnesses on

[4] It is interesting to note, in light of the assertion that appellant was denied due process, that the Commission, in an effort to assure complete fairness, went so far as to allow appellant's attorney to be sworn during the proceedings and give substantive testimony as to what Mr. Bruce would testify to. Appellant's attorney based his unusual testimony upon a telephone conversation he had had with Mr. Bruce wherein, among other things, Mr. Bruce confirmed that he would not appear in Nevada. T.C.H., Jan. 22, 1976, pp. 10-27.

his behalf, and was given the opportunity to testify and comment on the proceedings before the Board and particularly to comment upon the reasons for the recommendation of denial of the application. Indeed, appellant's own counsel moved into evidence the entire transcript of the proceedings before the Board. *Id.*, p. 43. At the conclusion of the hearing, the Commission voted unanimously to deny appellant's application for a State gaming license. *Id.*, p. 121.

Subsequent to the Commission's action, appellant filed a "petition for judicial review" of the decision in the Eighth Judicial District Court of Nevada. The petition was filed pursuant to N.R.S. 463.315, which provides for judicial review of Commission decisions "pursuant to N.R.S. 463.312. . . ." N.R.S. 463.312 is the disciplinary section of the gaming code and deals solely and exclusively with the "complaint; notice of defense; hearing; emergency orders; decision; [and] rehearing *afforded licensees* against whom charges have been brought" (emphasis added). Although the petition alleged violations of the First, Fourth, Fifth, Sixth, Eighth, Ninth and Fourteenth Amendments to the United States Constitution, it did not allege that the licensing provisions of the Nevada statutes (N.R.S. 463.140 and 463.220) were unconstitutional for want of standards. The petition did allege that the decision of the Commission was "made upon unlawful procedure" (¶8(c)), was "unsupported by any evidence" (¶8(d)), and was arbitrary and capricious (¶8(e)).

The State moved to dismiss on jurisdictional grounds, alleging that under Nevada law appellant had no right to judicial review of the denial of a gaming license application. The motion pointed out that

the judicial review provisions of 463.315 related solely to disciplinary proceedings involving those already licensed by the State. The motion was denied.

The District Court held (i) that N.R.S. 463.140 and 463.220 were unconstitutional in that they lacked ascertainable standards; (ii) that the determination of whether to license appellant was "part of the adjudicative process," a "judicial act"; (iii) that "no ascertainable standards" were established by statute or regulation of the Commission for the granting of a gaming license; (iv) that due process was denied appellant since he was "not notified of the charges against him"; and (v) that he was not "given an opportunity to present evidence" or to "cross-examine witnesses. . . ." The District Court thereupon enjoined enforcement of N.R.S. 463.140 and 463.220. Jurisdictional Statement, App. E. The following day, it amended its judgment to enjoin enforcement of said statutes as applied only to appellant Rosenthal. Jurisdictional Statement, App. F.

The State appealed the judgment to the Supreme Court of Nevada, alleging that the motion to dismiss should have been granted, that the relevant statutes and regulations of the Commission set forth sufficient criteria for the consideration of a gaming license application, that appellant had no constitutionally protected interest in an application for a state gaming license, and that appellant received the requisite due process at his hearings. Appellant presented arguments in opposition to the above.

On February 3, 1977, the Supreme Court of Nevada unanimously reversed the judgment of the District Court and reinstated the decision of the Commission

denying the application. Jurisdictional Statement, App. A.

In ruling that the motion to dismiss should have been granted, the court said:

> The legislature carefully has distinguished between persons who have been licensed and those who never have been licensed. In the former case judicial review of disciplinary action is provided; in the latter instance it is not. This is a reasonable distinction since licensees possess property interests which those who have never been licensed do not have. [*Id.* at 37.]

Since the Supreme Court of Nevada found no allegation in appellant's original petition for review that the licensing provisions were unconstitutional and since appellant had never previously been licensed, the court held that the judicial review provisions did not apply, and that appellant's complaint should have been dismissed. Despite this clear holding, the Nevada Supreme Court, in light of the District Court's challenge to the State's gaming statutes, decided "to resolve that issue." In so doing, the court held that the statutes could be read in conjunction with administrative regulations adopted by the Commission pursuant to N.R.S. 463.150(1). Regulation 3.090 dealt specifically with licensing and required that an applicant must satisfy the Commission that he "(a) Is a person of good character, honesty and integrity; (b) Is a person whose background, reputation and associations will not result in adverse publicity for the State of Nevada and its gaming industry; and (c) Has adequate business competence and experience for the role or position for which application is made." The court held that when

read alone *or* in conjunction with the regulations, the statutes set forth adequate standards for the granting of a license to participate in the privileged enterprise of gaming.

The court went on to find that appellant had in fact received procedural due process at the hearings, even though it did not believe that federal constitutional proscriptions were necessarily involved, because the court viewed gaming as a matter reserved to the states within the meaning of the Tenth Amendment to the United States Constitution.

The court noted that as a gaming employee, appellant held a "work permit" under N.R.S. 463.335(3) and that insofar as the denial of the application for a gaming license might be construed as a revocation of the work permit, it would condone no such result. His ability to work as a gaming employee in a position not subject to licensing had never been questioned, and was not an issue in the proceedings, and the court recognized that no revocation of a work permit could take place without notice, hearing and judicial review.

QUESTIONS PRESENTED

We submit that appellant's Jurisdictional Statement has not raised any substantial federal question for this Court's review. Each of appellant's four points are substantively without merit. Moreover, even assuming that a federal question were present, the instant case would be a wholly inappropriate vehicle for resolution of that question, for the reasons set forth below.

To assist this Court, we repeat here each of the four "Questions Presented" by appellant and set forth our position in regard to each of those questions.

APPELLANT'S FIRST "SUBSTANTIAL FEDERAL QUESTION"

(1) Whether N.R.S. 463.140 and N.R.S. 463.220, Which Grant the Nevada State Gaming Control Board and State Gaming Commission Power to Deny Applications to "Unsuitable Persons" and Give Them "Full and Absolute Power and Authority to Deny Any Application [for a Gaming License] for Any Cause Deemed Reasonable by the Board [or Commission]" Lack Ascertainable Standards and Are Thus Unconstitutionally Vague, in Violation of the Due Process Clause of the Fourteenth Amendment.

Even assuming that appellant's first question were before this Court for review, a substantial federal question would be lacking. However, this question is not before the Court. The Supreme Court of Nevada's holding that the challenged statutes were constitutional, in and of themselves, was an alternative holding. The court also ruled that the statutory language could be read in conjunction with administrative regulations adopted by the Commission and that those regulations provided ascertainable and constitutionally sufficient standards.

Moreover, developments subsequent to the decision of the Supreme Court of Nevada have rendered appellant's first question moot. Specifically, the Nevada legislature has amended Chapter 463 of the Nevada Revised Statutes by including therein a new provision incorporating into the gaming statutes certain standards for licensing decisions which formerly appeared in the administrative regulations of the Commission. Since there is no longer a "present, live controversy"

with respect to former Chapter 463, appellant's first question is moot. *See Suggestion of Mootness,* pp. 31-33 *infra.*

Even if the Nevada Supreme Court had based its decision solely upon the language of the State's licensing statutes—which it did not—appellant, in arguing that those statutes are void for vagueness, asks this Court to expand significantly the reach of the void-for-vagueness concept. The licensing statutes are not criminal in nature, nor do they in any way infringe upon an applicant's First Amendment rights. Appellant cites seven of this Court's opinions to support his contention. Interestingly enough, every one of these cases discusses the "void for vagueness" principle in the context of challenged *criminal* statutes or ordinances. Moreover, most of the statutes were perceived by the Court as affecting an individual's First Amendment rights.[6]

The same considerations which motivated the Court's scrutiny in the above-cited cases are wholly lacking in the instant action. Appellant does not stand

[6] *Grayned* v. *Rockford,* 408 U.S. 104 (1972) (antipicketing and antinoise ordinances); *Kunz* v. *New York,* 340 U.S. 290 (1951) (ordinance made it unlawful to hold public worship meeting without first obtaining permit); *Interstate Circuit, Inc.* v. *Dallas,* 390 U.S. 676 (1968) (ordinance made it misdemeanor to exhibit certain films to underage youths); *Staub* v. *City of Baxley,* 355 U.S. 313 (1958) (ordinance made it criminal offense to solicit for membership in an organization without first applying for permit); *Gelling* v. *Texas,* 343 U.S. 960 (1952) (ordinance made it criminal offense to exhibit certain motion pictures without first obtaining permit); *Cline* v. *Fink Dairy Co.,* 274 U.S. 445 (1927) (criminal provision of state antitrust law); *Connally* v. *General Construction Co.,* 269 U.S. 385 (1926) (criminal statute requiring employer to pay wages at "current" rate in "locality" of work).

charged with the violation of a criminal statute. The State of Nevada has not sought to impose a criminal penalty of any sort on him. Appellant does not assert (nor could he) that the State has in any way infringed upon his First Amendment rights. Appellant's challenge to Nevada's gaming statutes arises in his position as an applicant for a state gaming license. Thus, the due process guarantees inherent in a criminal proceeding are not present in the instant case. Appellant's argument that the "void for vagueness" doctrine should be significantly expanded is without basis and without support in this Court's precedents.

The only case that appellant can muster in support of his contention is *Hornsby* v. *Allen,* 326 F.2d 605 (5th Cir. 1964). *Hornsby* is factually inapposite to the instant case. It dealt with the issuance of liquor licenses under a "ward courtesy" system whereby an applicant could not obtain a license without the approval of an elected official in the district in which the applicant sought to conduct business. The Fifth Circuit noted that this practice could result in a qualified[7] applicant being rejected "as a political favor or the result of a clandestine arrangement." *Id.* at 610. In order to protect an applicant from such arbitrary treatment, the court stated that reasonable standards should be prescribed. Appellant here fails to point out, however, that the court expressly held that such standards could be implemented "through reasonable regulations *promulgated by the board,*"[8] which is exactly what the Commission has done in the instant case.

[7] Mrs. Hornsby alleged that she had satisfied the state's requirements pertaining to good moral character, an allegation that is not present in the instant case.

[8] *Id.* at 610 (emphasis added).

In assuming that a license applicant is entitled to full due process considerations, the Fifth Circuit failed to perceive the difference between a license applicant and a license *holder* whose license is revoked. Other circuits have therefore declined to follow *Hornsby, e.g., Lewis* v. *City of Grand Rapids,* 356 F.2d 276, 289 (6th Cir.), *cert. denied,* 385 U.S. 838 (1966), and the Fifth Circuit itself has carefully delimited the case's subsequent application. *Atlanta Bowling Center, Inc.* v. *Allen,* 389 F.2d 713, 716 (5th Cir. 1968) (*Hornsby* "is far from a holding that the Federal Courts sit as a super liquor board or a sort of extra-hierarchial appellate court in the stream of state jurisprudence to review non-constitutional errors of substance or procedure made by state licensing agencies.")

However, even if it were assumed that a state program for the issuance of gaming licenses is subject to a "void for vagueness" analysis, the question framed by appellant does not present a "substantial federal question" necessitating review by this Court. Although the Supreme Court of Nevada did hold that the particular sections, when read in the context of the other provisions of Chapter 463, contained constitutionally sufficient standards, this was only an *alternative* holding. The court also held that any alleged "defects" in the legislation were cured by standards incorporated in administrative regulations adopted by the Commission. As specifically stated by the court:

> . . . the legislature has expressed standards which have been implemented administratively. When one considers the interrelationship of the statutory standards and the regulations adopted administratively, any contention that there is an absence of appropriate standards must fail.

* * *

> Administrative regulations have been adopted by the Commission pursuant to legislative authorization. . . . If we were to assume that the standards announced in NRS 643.140 and 643.220 [sic] are inadequate legislative expressions for the control of licensing in a privileged industry, the implementing regulation would serve to cure the defect since the "gaps" may be filled in administratively. [Jurisdictional Statement, App. A, pp. 37-38 (citations omitted).]

Appellant, in formulating his first question, simply chooses to ignore this portion of the court's opinion. Thus, even if this Court were to decide appellant's first question, it would have no impact upon the rights of the litigants, since the decision of the Supreme Court of Nevada can stand on its alternative holding.

APPELLANT'S SECOND "SUBSTANTIAL FEDERAL QUESTION"

(2) Whether the Supreme Court of Nevada Was Correct in Holding That Gaming Is "a Matter Reserved to the States Within the Meaning of the Tenth Amendment," With the Consequence That There Is "No Room for Federally Protected Constitutional Rights."

Appellant, through the formulation of his second question, seeks to transform dicta of the Supreme Court of Nevada, taken out of context, into a substantial federal question. Appellant terms as "startling" and "novel" the court's statement that gaming is a "matter reserved to the states under the Tenth Amendment." Appellant apparently would be equally startled by the recently released report of the Commis-

sion on the Review of the National Policy Toward Gambling, which reaffirms the historical validity of the Nevada court's statement:

> Throughout American history, the prohibition and regulation of gambling activity has largely been a function of the States.
>
> * * *
>
> The Commission does not believe that the Federal Government, which represents the Nation as a whole, should substitute its judgment for that of the individual States in this area. Gambling has customarily been controlled by State agencies, which can be flexible and responsive to local demands; the Commission finds no public interest in preempting this authority by the imposition of binding national standards. While we express no predisposition on the appropriate roles of State and Federal Governments in the regulation and control of other activities, we do believe that where gambling is concerned there should be a considered reluctance on the part of the Federal Government to interfere with State policies. To the States should be left the determination of . . . how to operate or regulate those forms of gambling that are authorized. . . .
>
> * * *
>
> The proposition that States should determine their own gambling policies is consistent with the historical role played by the Federal Government.[*]

The paramount interest of the states in the regulation of legalized gambling has been recognized by the courts as well. *See, e.g., Medina* v. *Rudman,* 545 F.2d 244 (1st Cir. 1976); *United States* v. *Polizzi,* 500 F.2d

[*] *Gambling in America,* Final Report of the Commission on the Review of the National Policy Toward Gambling (Washington, D.C. 1976), pp. 5-6.

856 (9th Cir. 1974); *Hubel* v. *West Virginia State Racing Commission,* 513 F.2d 240 (4th Cir. 1975); *Marshall* v. *Sawyer,* 301 F.2d 639 (9th Cir. 1962). Perhaps this long-standing regulatory scheme is "novel" and "startling" to appellant, but it most clearly is not to those who have any familiarity with the history of gambling in the United States.

Appellant also argues that the Nevada Supreme Court's assertion that no constitutionally-protected property interest exists in the instant case is so "startling" that mere dicta is transformed into a substantial federal question. Appellant wrenches a portion of one sentence in the court's opinion out of context in an attempt to create an issue. Specifically, appellant quotes the court as saying "we find no room for federally protected constitutional rights" and conveniently omits the first three words of the sentence: "Within this context." Jurisdictional Statement, p. 14. Within the context of the instant case (*i.e.,* appellant's application for a gaming license) there is in fact no federally protected constitutional right asserted by appellant, for appellant, as an applicant for a gaming license, does not possess a constitutionally protected property or liberty interest sufficient to entitle him to the due process guarantees of the Fourteenth Amendment. As this Court stated in *Board of Regents* v. *Roth,* 408 U.S. 564, 570-571 (1972), "to determine whether due process requirements apply in the first place we must look not to the 'weight' but to the *nature* of the interest at stake." (emphasis in original) See pp. 19-23 *infra.*

In any event, even if the State is wrong and some interest of appellant is here entitled to constitutional

protection, appellant's second question does not present a substantial federal question for this Court's review, because the quoted language of the Supreme Court of Nevada is clearly dicta. This is so because the Commission and the Board both proceeded to accord appellant full constitutional protection and the courts fully reviewed his constitutional points. As appellant himself concedes, the Nevada Supreme Court "proceeded forthwith to consider and decide the federal constitutional questions which had been decided by the Nevada district court and which had been briefed and argued before the Supreme Court [of Nevada]." Jurisdictional Statement, p. 11.

The dicta of the Nevada Supreme Court thus cannot provide the basis for a substantial federal question necessitating resolution by this Court. As explained in *Black* v. *Cutter Laboratories,* 351 U.S. 292, 297-298 (1956):

> This Court . . . reviews judgments, not statements in opinions. *Herb* v. *Pitcairn,* 324 U.S. 117, 125-126; *Morrison* v. *Watson,* 154 U.S. 111, 115. See also *Williams* v. *Norris,* 12 Wheat. 117, 118, 120. At times, the atmosphere in which an opinion is written may become so surcharged that unnecessarily broad statements are made. In such a case, it is our duty to look beyond the broad sweep of the language and determine for ourselves precisely the ground on which the judgment rests.

Since the Nevada Supreme Court did in fact pass on each and every constitutional question raised by appellant, any dicta to the contrary does not raise a substantial federal question in the instant case.

APPELLANT'S THIRD "SUBSTANTIAL FEDERAL QUESTION"

(3) Whether N.R.S. 463.315, as Construed by the Supreme Court of Nevada, Improperly Prohibits Appellant from Obtaining Judicial Review of the Denial of His Application for a Gaming License by the Nevada State Gaming Commission in Contravention of Appellant's Fourteenth Amendment Rights.

Even a cursory examination of this Court's precedents indicates that an applicant for a state gaming license does not have a liberty or property interest sufficient to entitle him to the full panoply of procedural protections afforded by the Due Process Clause of the Fourteenth Amendment. In light of the long line of opinions rendered by this Court which have delineated the contours of protected Fourteenth Amendment interests, including *Board of Regents* v. *Roth, supra,* and most recently *Smith* v. *Organization of Foster Families for Equality and Reform,* 45 U.S.L.W. 4638, (decided June 13, 1977) it can hardly be said that a substantial federal question exists on this point. In any event, it is totally unnecessary for the Court to consider the question, since the record of this case clearly demonstrates that the Supreme Court of Nevada granted appellant's request for judicial review and proceeded to consider and decide each and every issue raised by appellant on appeal.

It is fundamental that the requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property, a range of interests which is not infinite. *Board of Regents* v. *Roth, supra,* 408 U.S. at 569-570. This Court has repeatedly ruled that the procedural guarantees of the Due Process Clause apply only in those instances

where a state seeks to remove or significantly alter a status recognized and protected by state law. *Paul* v. *Davis*, 424 U.S. 693, 710-711 (1976). And this Court has consistently looked to state law to determine the nature of the interest which is allegedly entitled to constitutional procedural protection. *Bishop* v. *Wood*, 426 U.S. 341 (1976); *Board of Regents* v. *Roth, supra*. *See also Medina* v. *Rudman, supra* (status of applicant for greyhound license determined by reference to state law).

An examination of Nevada's gaming statutes conclusively lays to rest appellant's assertion that he has a "state-granted right to acquire, possess and protect" [10] a state gaming license. Contrary to appellant's argument, the Nevada Legislature has clearly established that an applicant has no vested property interest in a gaming license. NRS 463.130(2) expressly provides that a gaming license is a "revocable privilege" and that "no holder thereof shall be deemed to have acquired any vested rights therein or thereunder." The Supreme Court of Nevada was therefore fully justified in holding that "gaming is a matter of privilege conferred by the state rather than a right." [11]

As this Court explained in *Roth*, the Fourteenth Amendment's procedural protection of property is "a safeguard of the security of interests that a person *has already acquired* in specific benefits." *Board of Regents* v. *Roth, supra*, 408 U.S. at 576 (emphasis added). Thus, in order to have a constitutionally protected property interest in a benefit, a person "clearly

[10] Jurisdictional Statement, pp. 28-29.

[11] Jurisdictional Statement, Appendix A, p. 35.

must have more than an abstract need or desire for it" and more than a "unilateral expectation of it." Rather, a "legitimate claim of entitlement" to the benefit must exist. *Id.* at 577. Under the law of the State of Nevada, it is manifestly obvious that no citizen (particularly one with a prior criminal record such as appellant) can claim an *entitlement* to a state gaming license.[12]

Appellant argues that he has a fundamental right to participate in the gaming industry as a "common occupation of life." *Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1923).[13] This argument was squarely rejected by the First Circuit in *Medina* v. *Rudman, supra*. Noting that "rights of this potency are a special breed," the court stated that

> . . . we do not consider racetrack ownership to be one of life's "common occupations." Gambling is traditionally suspect in our society, and investment in such an enterprise, when permitted at all, is plainly open to the strictest kind of supervision.
>
> We think the state, under its police powers, is entitled, if it elects, to issue racetrack licenses,

[12] Both the Nevada Supreme Court and the State of Nevada recognize that a license holder is entitled to procedural due process before his license can be revoked. As the court stated:

> A reasonable distinction exists between the status of one who seeks to acquire a license, and the status of one who possesses a work permit as a gaming employee. The former does not have existing privileges, but is attempting to acquire them. The latter does have an existing privilege, and is entitled to receive notice and a hearing before his privilege to work as a gaming employee can be nullified. [Jurisdictional Statement, Appendix A, p. 43.]

In the instant case, appellant was seeking the privilege of obtaining a gaming license for the first time.

[13] Jurisdictional Statement, p. 28.

> and to regulate participation thereunder, on a discretionary basis as it has chosen to do here. Given the social evils associated with gambling and the state's revenue interests, the state's choice of means in the selection of licensees is entitled to prevail over the private interests of potential investors. [545 F.2d at 251 (footnote omitted).]

Appellant further argues that his work permit gave him a "legitimate entitlement" to continue working.[14] This is not controverted. The Nevada Supreme Court agreed with appellant, and invalidated the Gaming Commission regulation which previously allowed a work permit to be revoked without judicial review.[15] Indeed, appellant continues to hold a valid work permit.

Appellant finally attempts to characterize the Gaming Commission's actions as the infringement of a "liberty" interest protected by the Fourteenth Amendment. Appellant's argument turns this Court's definition of a constitutionally protected liberty interest on its head. Each and every case cited by appellant involved a state action which resulted in a person losing a previously held status or position.[16]

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[14] Jurisdictional Statement, p. 29.

[15] Jurisdictional Statement, Appendix A, p. 42.

[16] *Wisconsin* v. *Constantineau*, 400 U.S. 433 (1971) (citizen prohibited from purchasing liquor without notice or hearing); *Goss* v. *Lopez*, 419 U.S. 565 (1975) (student suspended from public school without hearing); *Catrone* v. *Massachusetts Racing Commission*, 404 F.Supp. 765 (D. Mass. 1975), *vacated on other grounds*, 535 F.2d 669 (1st Cir. 1976) (horse trainer prohibited from further presence at racetrack); *cf. Paul* v. *Davis*, 424 U.S. 693 (1976) (damage to reputation alone does not require Fourteenth Amendment procedural protections).

Appellant finally argues that his reputation was injured by the Commission's action in denying his application for a gaming license. The basis for this contention is difficult to fathom. Appellant seeks to indict the Commission for rendering to appellant the very procedural guarantees he seeks. Specifically, appellant argues that the Commission, by listing four specific reasons for denying appellant's application, damaged his reputation. Each fact recited by the Commission, however, had been a matter of public record *prior to* the Commission's action. In addition, the Commission's findings were only published *after* each item had been considered at the public hearing. In fact, appellant himself had listed much derogatory information about himself in his application. If appellant did not realize that his past brushes with the law would be fully considered by the Commission, he is more ingenuous than his record would indicate.

Even if it is assumed that appellant's reputation suffered injury because of the Commission's ruling, this Court has ruled (and appellant is forced to concede) that a person must suffer more than mere injury to his reputation in order to invoke the procedural guarantees of the Fourteenth Amendment. *Paul* v. *Davis, supra.*

As the foregoing discussion indicates, appellant's contention that his "property" and/or "liberty" interests in obtaining a state gaming license entitled him to judicial review under the Fourteenth Amendment does not broach even an insubstantial federal question. This Court's rulings quite clearly foreclose such an argument. But even if this Court wished to consider whether such an interest should be elevated to consti-

tutional status, the instant case is not an appropriate vehicle for such consideration. The reason, quite simply, is that the Supreme Court of Nevada in fact granted appellant's request for judicial review, and carefully considered and decided each and every issue presented by appellant.

APPELLANT'S FOURTH "SUBSTANTIAL FEDERAL QUESTION"

(4) Whether the Procedures Followed by the Nevada State Gaming Commission in Denying Appellant a Gaming License Violated the Due Process Clause of the Fourteenth Amendment.

Appellant's fourth question, like his third, fails to present a substantial federal question for exactly the same reason. Quite simply, appellant, as an applicant for a state gaming license, does not possess a "liberty" or "property" interest in procuring such a license sufficient to require the State of Nevada to cloak the application process with the full array of procedural requirements mandated by the Fourteenth Amendment. *See* pp. 19-23, *supra*. Since the threshold requirement of a constitutionally-protected liberty or property interest is not present in the instant case, this Court need not engage in an evaluation of the procedures afforded to appellant by the State. *Mathews* v. *Eldridge*, 424 U.S. 319, 332 (1976).

However, even if such an evaluation were undertaken, this Court would be hard-pressed to conclude that a substantial federal question is raised by appellant. For as the record clearly demonstrates, the procedures afforded to appellant by the State of Nevada more than amply satisfy the requirements of the Due Process Clause of the Fourteenth Amendment.

Although this Court has consistently held that some form of hearing is required before an individual is finally deprived of a constitutionally recognized property interest, "in only one case, *Goldberg* v. *Kelly*, 397 U.S. at 266-271, has the Court held that a hearing closely approximating a judicial trial is necessary." *Mathews* v. *Eldridge, supra*, 424 U.S. at 333. As the Court explained in *Mathews:*

> In other cases requiring some type of pretermination hearing as a matter of constitutional right the Court has spoken sparingly about the requisite procedures. *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969), involving garnishment of wages, was entirely silent on the matter. In *Fuentes* v. *Shevin*, 407 U.S., at 96-97, the Court said only that in a replevin suit between two private parties the initial determination required something more than an *ex parte* proceeding before a court clerk. Similarly, *Bell* v. *Burson, supra*, at 540, held, in the context of the revocation of a state-granted driver's license, that due process required only that the prerevocation hearing involve a probable-cause determination as to the fault of the licensee, noting that the hearing "need not take the form of a full adjudication of the question of liability." See also *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U.S. 601, 607 (1975). More recently, in *Arnett* v. *Kennedy, supra*, we sustained the validity of procedures by which a federal employee could be dismissed for cause. They included notice of the action sought, a copy of the charge, reasonable time for filing a written response, and an opportunity for an oral appearance. Following dismissal, an evidentiary hearing was provided. 416 U.S., at 142-146. [424 U.S. at 333-334.]

"Due process" does not specify a fixed, immutable set of procedures to be equally applied in every situation. *Cafeteria Workers* v. *McElroy,* 367 U.S. 886 (1961).Thus, in order to determine the constitutional propriety of procedures afforded an individual in a particular context, a court must analyze the competing governmental and private interests that are affected, *Arnett* v. *Kennedy,* 416 U.S. 134 (1974), and the risk of erroneous deprivation of a protected interest and the possible value of additional procedural safeguards. *Mathews* v. *Eldridge, supra,* 424 U.S. at 335.

As has been previously demonstrated, the only private interest involved in the instant case is the possibility of obtaining a state gaming license. An applicant does not have a legitimate property or liberty interest in procuring such a license. Rather, the only *arguable* interest that an individual has is to be treated fairly and in the same manner as any other applicant. Appellant has never alleged that he has been "singled out" for separate adverse treatment by the State, nor could he hope to support such an allegation. Thus, the private interest involved—the possibility of procuring a gaming license—pales in comparison to other private interests this Court has analyzed in the past.[17]

On the other hand, the interest of the State of Nevada in maintaining the integrity of the state's gaming industry is substantial. The history of Nevada gaming as chronicled in the decisions of various courts clearly demonstrates that it is of paramount importance to the State of Nevada to keep criminal elements from infiltrating legalized gaming.[18]

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[17] See footnote 16, *supra.*

[18] *See, e.g., Nevada Tax Commission* v. *Hicks,* 73 Nev. 115 (1957).

In *Hubel* v. *West Virginia State Racing Commission, supra,* the Fourth Circuit recognized the substantial state interest involved in maintaining the integrity of legalized gambling. Noting that the *holder* of a racehorse owner's permit had a constitutionally recognized property interest, the court refused to stay the temporary suspension of the permit without notice and a hearing where it was found that one of his horses had been illegally drugged prior to competing in a race. In so holding, the court recognized that the State had two substantial interests to be served. In addition to its humanitarian interest in protecting the health of the horse, the State additionally has "a broader and more weighty interest in protecting the purity of the sport, both from the standpoint of protecting its own substantial revenues derived from taxes on legalized parimutual betting and protecting patrons of the sport from being defrauded." 513 F.2d at 243. The court noted that tampering with a race horse

> is so serious and the consequences so severe that absolute protection . . . to the public is fully warranted. . . . The public is entitled to protection from the continuing danger that one who participates in drugging his horse will do so again, and that one who fails to protect his horse from drugging by others will repeat his negligence. [*Id.* at 244.]

The First Circuit similarly has recognized the substantial interests possessed by a state in the regulation of legalized gambling:

State ex rel Grimes v. *Board,* 53 Nev. 364 (1931); *Marshall* v. *Sawyer,* 301 F.2d 639 (9th Cir. 1962).

> Gambling is traditionally suspect in our society, and investment in such an enterprise, when permitted at all, is plainly open to the strictest kind of supervision.
>
> We think the state, under its police powers, is entitled, if it elects, to issue racetrack licenses, and to regulate participation thereunder on a discretionary basis as it has chosen to do so here. Given the social evils associated with gambling and the state's revenue interests, *the state's choice of means in the selection of licensees is entitled to prevail over the private interests of potential investors.* [*Medina* v. *Rudman, supra,* 545 F.2d at 251 (footnote omitted; emphasis added).]

Legalized gambling plays a larger role in the economy of Nevada than in any other state in the country. Nevada thus has a far greater interest in maintaining the integrity of the industry than do any of her sister states.[19] What the Fourth Circuit recognized with respect to West Virginia and what the First Circuit recognized with respect to New Hampshire applies with even greater force to Nevada, where the gaming industry comprises a substantial portion of the State's economy.

The final factor to be considered in the *Mathews* v. *Elridge* equation is whether the particular procedures employed could have erroneously deprived the individual of a protected interest.

Once again, the short answer to this inquiry is that the appellant does not have a constitutionally protected interest in obtaining a state gaming license. Obviously, there can be no risk of erroneous deprivation

[19] See footnote 1, *supra.*

of an interest that is nonexistent in the first place. However, as already noted, even assuming that appellant did have some cognizable "interest" in obtaining a license, the procedures provided him by the State of Nevada ensured that his application received a full, open and thorough evaluation.

Appellant participated in three separate hearings during the course of this controversy. The first hearing was convened by the Commission to determine the scope of appellant's responsibilties in gaming. At the conclusion of this two-day proceeding, it was determined that appellant was a "key employee" of Argent Corporation and thus required to obtain such a license.

Although state law requires that a key employee file a license application within thirty days of such a finding,[20] the Commission granted appellant's request for a continuance so that he could resolve two pending federal indictments prior to filing his application. The extension granted appellant exceeded 6 months.

After appellant submitted his license application, the Board held a public hearing to allow appellant to present evidence in support of his application and to respond to any information uncovered by the Board's investigation into his background. Appellant was represented by two attorneys at the hearing. He testified in his own behalf. He subpoenaed three employees of the Board, all of whom testified. Fifteen other individuals appeared before the Board and under questioning from appellant's counsel and Board members testified on behalf of appellant. The Board received into evidence seven letters offered by appellant attesting

[20] N.R.S. 463.595(2).

to his character. Appellant was given the opportunity to explain or rebut several detrimental items brought to the Board's attention, including the following:

> —appellant's North Carolina conviction for conspiracy to bribe a college basketball player.
>
> —sworn testimony given before a United States Senate Subcommittee alleging that appellant attempted to bribe one Mickey Bruce to fix a college football game.
>
> —sworn testimony given before a United States Senate Subcommittee and the Florida Racing Commission alleging that appellant was corrupting public officials.
>
> —the revocation of appellant's horse racing license by the State of Florida and the permanent barring of appellant from all Florida racetracks.

The Board, in recommending denial of appellant's application, specifically stated four reasons for the recommendation.

The recommendation of the Board was then considered by the Commission at a separate hearing, pursuant to N.R.S. 463.220(4). At this hearing appellant was again represented by counsel, appeared as a witness on his own behalf and called other witnesses to testify for him. During the course of the proceedings individual Commission members gave appellant the opportunity to comment on the information in the record which concerned them and had been the basis for the Board's recommendation of denial. After the Commission acted, appellant sought and obtained judicial review of the entire process.

It is respectfully submitted that the administrative proceedings, in and of themselves, more than satisfied

the procedural guarantees of the Fourteenth Amendment. The two key elements of procedural due process —notice and an opportunity to be heard [21]—were more than fully satisfied by the procedures afforded appellant by the State of Nevada.

SUGGESTION OF MOOTNESS

The first question presented to this Court by appellant is whether N.R.S. 463.140 and 463.220 are unconstitutionally vague in that they lack ascertainable standards for the granting or denial of license applications. Appellant has chosen to argue that these standards are facially unconstitutional.

The State of Nevada wishes to inform this Court that effective May 16, 1977, the Nevada Legislature amended Chapter 463 to incorporate into that Chapter standards formerly contained in the regulations of the Commission.[22] Specifically, a new section was added to N.R.S. 463.170 as follows:

> 2. An application to receive a license or be found suitable shall not be granted unless the commission is satisfied that the applicant is:
>
> (a) A person of good character, honesty and integrity;
>
> (b) A person whose prior activities, criminal record, if any, reputation, habits and associations do not pose a threat to the public interest of this state or to the effective regulation and control of gaming, or create or enhance the dangers of unsuitable, unfair or illegal practices, methods and

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[21] *Bell* v. *Burson*, 402 U.S. 535 (1971).

[22] Chapter 571, Statutes of Nevada, 59th Session of the Nevada Legislature.

activities in the conduct of gaming or the carrying on of the business and financial arrangements incidental thereto; and

(c) In all other respects qualified to be licensed or found suitable consistent with the declared policy of the state.

The State of Nevada respectfully submits that this amendment to Chapter 463 of the Nevada Revised Statutes renders appellant's first question moot. In light of the requirement that the Nevada Gaming Control Act must be read as "a unified legislative plan," *United States* v. *Polizzi, supra,* 500 F.2d at 875, N.R.S. 463.170 mandatorily supplements the challenged provisions since the Board and Commission are obligated to apply its specific standards.

The constitutionality of the challenged provision raises an academic, theoretical question; it no longer presents a live controversy necessitating a decision by this Court. This Court has consistently refrained from passing on the constitutionality of a statute until a case involving it has reached a stage where the decision of a precise or constitutional issue is a necessity. *United States* v. *Petrillo,* 332 U.S. 1, 5 (1947). "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Spector Motor Service* v. *McLaughlin,* 323 U.S. 101, 105 (1944). Certainly the question of whether a portion of a statute no longer in force was unconstitutional does not present an "unavoidable" precisely

defined constitutional issue, the decision of which is a "necessity." [*]

CONCLUSION

For all of the foregoing reasons, it is respectfully requested that this Court affirm the judgment of the Supreme Court of Nevada, or in the alternative dismiss the appeal for lack of a substantial federal question or on grounds of mootness.

Respectfully submitted,

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[*] The instant case is thus analogous to *Diffenderfer* v. *Central Baptist Church,* 404 U.S. 412 (1972), in which appellant's challenge to a Florida statute was rendered moot by a revision of the challenged section during the course of the appeal. As the Court noted, "[t]he case has therefore lost its character as a present, live controversy of the kind that must exist if we are to avoid advisory opinions on abstract propositions of law." *Id.* at 414, citing *Hall* v. *Beals,* 396 U.S. 45, 48 (1969). *See also Bryan* v. *Austin,* 354 U.S. 933 (1957); *cf. United States* v. *Alaska Steamship Co.,* 253 U.S. 113 (1920); *Sanks* v. *Georgia,* 401 U.S. 144 (1971); *Richardson* v. *Wright,* 405 U.S. 208 (1972).

Supreme Court, U. S.
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No. 76-1714

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

FRANK ROSENTHAL, *Appellant*,

v.

STATE OF NEVADA AND
STATE OF NEVADA GAMING COMMISSION, *Appellees*.

On Appeal from the Supreme Court of Nevada

REPLY MEMORANDUM FOR APPELLANT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1714

FRANK ROSENTHAL, *Appellant*,

v.

STATE OF NEVADA AND
STATE OF NEVADA GAMING COMMISSION, *Appellees*.

On Appeal from the Supreme Court of Nevada

REPLY MEMORANDUM FOR APPELLANT

Appellees seek to minimize the importance of this case by beclouding the real substance of the decision of the court below, and by attempting to characterize the appellant as unsavory and unworthy. Labelling the holdings below as dictum or as alternative holdings, and the use of *ad hominem* arguments, to disparage what are indeed substantial federal questions, should not divert this Court from the significant issues raised by the decision below.

I.

VAGUENESS

The question whether NRS 463.140 and NRS 463.220 are unconstitutionally vague in that they lack ascertainable standards for the granting or denial of gambling license applications is a substantial federal question which is properly before this Court.[1] Appellees contend that because the court below stated that any indefiniteness or gaps in NRS 463.140 and NRS 463.220 were filled by regulations issued to implement the statute, the Supreme Court of Nevada's holding that these sections of the Nevada gambling laws are constitutional is an alternative holding. (Motion to Dismiss or Affirm, p. 11.) The statement of the court below that Gaming Commission regulations could cure any unconstitutional indefiniteness in NRS 463.140 and NRS 463.220 is not an alternate holding. It is merely an additional reason which the court below used to bolster its conclusion that these challenged sections of the Nevada gambling laws were constitutional. The court below made this clear when it said (App. A, p. 38):

> "We wish, however, explicitly to state that the statutory standards alone are sufficient. . ."

Appellees also contend that a recent revision to NRS 463.170 makes moot the question of the constitutionality of NRS 463.140 and NRS 463.220. (Motion to Dismiss or Affirm, pp. 11, 32.) This revision, which might be called the "Frank Rosenthal amendment," is clearly an *ex post facto* effort by the state to lift itself by its

[1] No question is raised in the Motion to Dismiss or Affirm as to the jurisdiction of this Court. The federal questions were considered and decided by the court below. See pp. 14, 16-18 of the Jurisdictional Statement for further discussion.

own bootstraps. Whatever its effect may be in the future, it was not applicable in the proceedings before the Board, the Commission, the district court or the court below. Even if it were applicable to this case, it is little more than a dressed up version of Gaming Commission Regulation 3.090, which appellant has argued is itself unconstitutionally vague, and which raises serious First Amendment questions.[2]

NRS 463.140 and NRS 463.220, the sections of the Nevada gaming laws which are at issue in this case, have not been revised. NRS 463.140 and NRS 463.220 provide that an application for a gaming license may be denied for "any cause deemed reasonable" by the Board or Commission. While paragraphs (a) and (b) of the revised version of NRS 463.170 suggest some criteria, the lack of specificity in NRS 463.140 and NRS 463.220 is emphasized by paragraph (c) of NRS 463.170 which provides that a license applicant must be qualified "in all other respects".[3] What this means

[2] Appellees appear to argue that, in the absence of a First Amendment issue and a criminal sanction, appellant's argument that NRS 463.140 and NRS 463.220 are unconstitutionally vague cannot be sustained. As *Hornsby* v. *Allen*, 326 F.2d 605 (5th Cir. 1964) and *Atlanta Bowling Center, Inc.* v. *Allen*, 389 F.2d 713 (5th Cir. 1968) indicate, this latter contention is patently incorrect. Moreover, as appellant has noted (Jurisdictional Statement, p. 21, n.15) Regulation 3.090 (now embodied in the revision to NRS 463.170) raises important First Amendment questions in that it disqualifies for licensing a person on the basis of associations, which is more than a marginal incursion on First Amendment freedoms.

[3] Paragraph (b) of the revision to NRS 463.170 refers to the "prior activities" and "criminal record" of a license applicant. Yet, the Court of Appeals for the Fifth Circuit has stated: "If the state investigates the moral character of an individual upon whom it intends either to bestow a benefit or to impose a burden, due process requires that such inquiry look to *present* moral character." *An-*

is nowhere specified. Thus, the Commission can continue to deny license applications pursuant to NRS 463.140 and NRS 463.220 for any cause it deems reasonable.

As in *Carroll* v. *President and Commissioners of Princess Anne,* 393 U.S. 175, 179 (1968), the "underlying question persists"—namely, the constitutionality of NRS 463.140 and NRS 463.220—and can be raised subsequently if appellant or others were to apply for licenses pursuant to NRS 463.140 and NRS 463.220. This Court has concluded that when underlying questions persist, in the face of changed circumstances, the case is not moot. *United States* v. *Trans-Missouri Freight Ass'n,* 166 U.S. 290 (1897). Moreover, the question of what procedures should be afforded to a license applicant, consistent with due process, is in no way changed by the revisions to NRS 463.170, nor is the question whether gaming regulation is so far reserved to the states by the Tenth Amendment that it need not meet federal constitutional standards. Thus, questions embodied in the decision below and the order of the Commission are not resolved, and the case is not moot.[4]

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drews v. *Drew Municipal Separate School District,* 507 F.2d 611, 614, n.6 (5th Cir. 1975), *certiorari dismissed as improvidently granted,* 425 U.S. 559 (1976), *citing Schware* v. *Board of Bar Examiners,* 353 U.S. 232 (1957).

[4] The cases cited by appellees to support their contention are not analogous to the situation here. *Diffenderfer* v. *Central Baptist Church,* 404 U.S. 412 (1972) involved a request for a declaratory judgment, where, unlike here, no injury had yet occurred. *Hall* v. *Beals,* 396 U.S. 45 (1969), *Bryan* v. *Austin,* 354 U.S. 933 (1957), *United States* v. *Alaska Steamship Co.,* 253 U.S. 113 (1920), *Sanks* v. *Georgia,* 401 U.S. 144 (1971) and *Richardson* v. *Wright,* 405 U.S. 208 (1972) all involved situations in which the challenged

What remains at issue in this case is a state statute, regulating the grant or denial of gaming license applications, which fails to provide the specificity that the Due Process Clause of the Fourteenth Amendment requires. Appellant is an applicant for a license which, pursuant to that statute, can be denied for "any cause deemed reasonable" by the Gaming Control Board and Gaming Commission. That he is an applicant does not mean that the constitutionality of this statute should be judged by a more lenient standard than if appellant were a license holder, as appellees imply. *See Hornsby* v. *Allen,* 326 F.2d 605, 612 (5th Cir. 1964).[5] *Atlanta Bowling Center, Inc.,* v. *Allen,* 389 F.2d 713, 715-716 (5th Cir. 1968) does not disturb that conclusion, but reaffirms it.[6]

What remains true is that NRS 463.140 and NRS 463.220, regardless of the revision of NRS 463.170, is a statute "which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess as to its application,

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statute, order or regulation was itself entirely changed by a later enactment. Here, the challenged statutes, NRS 463.140 and NRS 463.220, have not been changed.

[5] *Cf. Miller* v. *Carter,* 547 F.2d 1314 (7th Cir. 1977) (per curiam), *cert. granted sub. nom. Carter* v. *Miller,* April 18, 1977, No. 76-1171.

[6] *Lewis* v. *City of Grand Rapids,* 356 F.2d 276, 289 (6th Cir.), *cert. denied,* 385 U.S. 838 (1966) similarly does not disturb that conclusion, because the court, while noting that some observations in *Hornsby* v. *Allen, supra,* were at odds with its conclusion and therefore that *Hornsby* would not be followed, *id.,* at 289, stated: "We hold only that the . . . Fourteenth Amendment to the United States Constitution [did not require] that the Grand Rapids City Commission hold a *full* due process hearing to consider Plaintiff Lewis' request for a transfer to him of a license then owned by another." *Id.,* at 285; emphasis added.

[which] violates the first essential of due process of law." *Connally* v. *General Construction Co.*, 269 U.S. 385, 391 (1926).[7]

The Court is properly presented with a live controversy over the constitutionality of a state statute which is both vague and standardless. In light of the number of states which are or have been legalizing gambling, this statute, which is the lynchpin for regulation of that industry by the state best known for permitting gambling, merits review by this Court.

II.

TENTH AMENDMENT

The holding of the court below that gaming is "a matter reserved to the states within the meaning of the Tenth Amendment" and that "Within this context we find no room for federally protected constitutional rights" (App. A, p. 40) raises an important federal question. The fact that the court below reviewed appellant's constitutional challenges to the Nevada gaming laws, as appellees concede, does not change this holding into dictum. Rather, the scope of the judicial review afforded confirms that the view of the court below in regard to the Tenth Amendment materially affected its conclusion. The court below found that NRS 463.140 and NRS 463.220 should be judged by

[7] The requirement of statutory specificity is designed, *inter alia*, to prevent selective and arbitrary enforcement or application, whether resulting from a "ward courtesy" system as in *Hornsby* v. *Allen*, *supra*, or for any other reason. It is the possibility of *ad hoc* and subjective decision-making that is the danger, not the political or bureaucratic process by which such decisions are made. It is such subjective decision-making that the due process requirement of specificity is designed to prevent. *See Grayned* v. *City of Rockford*, 408 U.S. 104, 108-109 (1972).

state rather than federal constitutional standards, that these sections complied with the Nevada constitution, and that no federal question was presented. (App. A, p. 38, 40, 44). These are conclusions which can only be made because they follow inevitably from the novel, surprising, and faulty holding that, by virtue of the Tenth Amendment, a state is free to disregard federal constitutional requirements and protections in connection with the regulation of gambling. On this basis, the court below disposed of appellant's federal constitutional claims on what it called state constitutional grounds. It can hardly be considered—or camouflaged—as dictum.

Appellees contend that even if the Tenth Amendment views of the court below are neither dictum nor correct, the states bear primary responsibility for the regulation of gambling. (Motion to Dismiss or Affirm, p. 16-17.) It does not follow, however, as appellees imply, that state regulation of gambling is an area reserved exclusively to the states,[8] or that regulation of gambling can be permitted to meet only state rather than federal constitutional standards.[9] Federal constitu-

[8] *See* Jurisdictional Statement, pp. 23-24, n.17, for a compilation of federal court decisions where courts have declined to find gambling an area exclusively reserved to the states.

[9] Appellees reach this startling conclusion by arguing that the alleged absence of a liberty or property interest disqualifies appellant from Fourteenth Amendment due process protections. (Motion to Dismiss or Affirm, p. 17.) This characterization of the issue concedes, on the one hand, that state regulation of gambling must meet federal constitutional standards. On the other hand, it begs the question of the appropriate constitutional standard for the regulation of gambling by implying that this initial question cannot be reached unless there is an interest protected under the federal constitution.

tional requirements apply to state regulation of gambling as to other areas traditionally within the states' primary regulatory responsibility. *See e.g., California* v. *LaRue,* 409 U.S. 109, 115 (1972); *Wisconsin* v. *Constantineau,* 400 U.S. 433 (1971) (liquor licensing); *Wolff* v. *McDonnell,* 418 U.S. 539 (1974); *Morrissey* v. *Brewer,* 408 U.S. 471 (1972) (prisoners in state prisons); *Bell* v. *Burson,* 402 U.S. 535, 539 (1971) (driver's license).

This Court has said:

> "Certainly there is no profession, possibly no business, which does not offer peculiar opportunities for reprehensible practices; and as to every one of them, no doubt, some can be found quite ready earnestly to maintain that its suppression would be in the public interest. Skillfully directed agitation might also bring about apparent condemnation of any one of them by the public. Happily for all, the fundamental guarantees of the Constitution cannot be freely submerged if and whenever some ostensible justification is advanced and the police power invoked."

Adams v. *Tanner,* 244 U.S. 590, 594-595 (1917). Simply because the profession to be regulated is gambling, and thus the state police power is invoked, the state cannot abrogate the due process requirements of the federal constitution. Federal constitutional standards, notwithstanding the conclusion of the court below, apply to areas within the states' police power. *See, e.g., Allgeyer* v. *Louisiana,* 165 U.S. 578 (1897) (insurance); *Power Manufacturing Co.* v. *Saunders,* 274 U.S. 490, 495 (1927) ("It of course rests with the State to prescribe the venue of actions brought in her courts. But the exercise of this power, *as of all others,* must be in keeping with the limitations which the Constitution of the United States places on state action.") (emphasis added).

The novel holding of the court below, designed to prevent federal intrusion into gambling,[10] cannot be brushed aside as mere dictum. Nor can it be said to be simply a recital of existing law in regard to the states' role in the regulation of gambling. Rather, this unique and surprising holding raises the substantial questions whether the Fourteenth Amendment applies to gambling, and whether state regulation of gambling must meet federal or state constitutional standards. These questions warrant review by this Court.

III.

JUDICIAL REVIEW

The court below concluded that NRS 463.315 does not provide for judicial review of the denial of an application for a gambling license. (App. A, p. 36.) That conclusion is not disturbed because the court below went on to review and decide appellant's constitutional challenges. Were the present appellant, or another applicant to seek review of a gambling license denial, there is little doubt that Nevada courts would cite the decision of the court below for the proposition that NRS 463.315 precludes judicial review. Appellees should not be allowed to contend that this holding is not important because judicial review was provided, and then argue that the judicial review provided was

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[10] The Nevada Supreme Court stated: "It is apparent that if we were to recognize federal protections of this wholly privileged state enterprise, necessary state control would be substantially diminished and federal intrusion invited." (App. A, p. 40.)

not important because it resulted in mere alternate holdings or was only dictum.[11]

The conclusion of the court below that NRS 463.315 does not provide for judicial review is at odds with this Court's decisions. (Jurisdictional Statement, pp. 26-28.) Judicial review of administrative decisions is required when protected liberty or property interests are at stake. Appellant had such interests. (Jurisdictional Statement, pp. 28-29.) The denial of a license deprives appellant of a property interest in the future possibility of pursuing his chosen profession, *see Greene* v. *McElroy,* 360 U.S. 474 (1959), *Birkenfield* v. *United States,* 369 F.2d 491, 494 (3rd Cir. 1966), in his chosen geographical location, *see Christhilf* v. *Annapolis Emergency Hospital,* 496 F.2d 174, 178 (4th Cir. 1974). It deprives appellant of a liberty interest in that it "foreclosed his freedom to take advantage of other employment opportunities", *Board of Regents* v. *Roth,* 408 U.S. 564, 573 (1972), and injures his reputation. *Paul* v. *Davis,* 424 U.S. 693, 701 (1976). Thus, the decision of the court below contravenes the precedents established by this Court which require judicial review of administrative decisions which result in the deprivation of protected interests.

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[11] Appellees also try to have it both ways by arguing that in 1974 "47 percent of all State revenues were derived from licensed gambling" (Motion to Dismiss or Affirm, p. 2, n. 1), but that gambling in Nevada is not a "common occupation" entitled to the due process protections of the Fourteenth Amendment. (Motion to Dismiss or Affirm, p. 21.) Gambling is a legitimate occupation in Nevada. "The right to pursue a legitimate occupation is a fundamental right." *Doubles* v. *Gragson,* 91 Nev. 301, 535 P.2d 677 (1975).

IV.

DENIAL OF A PROPER HEARING

The quantum of due process protections to be afforded when liberty and property interests are at stake varies. *Cafeteria and Restaurant Workers Union, Local 473* v. *McElroy,* 367 U.S. 886 (1961). At a minimum, due process requires "notice and opportunity for hearing appropriate to the nature of the case." *Goss* v. *Lopez,* 419 U.S. 565, 579 (1975), *quoting Mullane* v. *Central Hanover Trust Co.,* 339 U.S. 306, 313 (1950). The procedures employed by the Nevada Gaming Commission failed to provide either. A 200-odd page transcript of the Gaming Control Board hearing made available 15 hours prior to the Gaming Commission hearing on appellant's license application raises serious questions as to what is constitutionally permissible notice. A hearing in which it was impossible to obtain critical witnesses for lack of time,[12] where there was no impartial decision-maker, nor a decision resting on substantial evidence, nor the cross-examination of witnesses whose statements deprive a person of his livelihood, raises important questions about what is a constitutionally permissible opportunity to be heard "at a meaningful time and in a meaningful manner." *Armstrong* v. *Manzo,* 380 U.S. 545, 552 (1955). The right to a hearing embraces an "adequate opportunity . . . to defend." *Louisville and Nashville R.R. Co.* v. *Schmidt,* 177 U.S. 230, 236 (1900). Whether this opportunity has been denied must be determined "by the

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[12] Despite appellees' contentions, the presence or testimony of important witnesses could have been obtained. (Jurisdictional Statement, p. 31, n.25). That the Commission provided a pale substitute for such important live testimony by permitting hearsay testimony is irrelevant.

substance of things and not by mere form." *Simon* v. *Craft*, 182 U.S. 427, 436 (1901). The hearing afforded appellant by the Gaming Commission was a triumph of form over substance. The question of the procedural protections which due process required that the appellant be afforded are not insubstantial; incursions on protected liberty and property interests lie beneath them.

CONCLUSION

The decision of the court below raises important questions about the scope and content of the Tenth Amendment and of the Due Process Clause of the Fourteenth Amendment. In view of the number of states which have legalized gaming, and of the importance of Nevada as a leader in that movement, these questions—substantial, significant, and troublesome—warrant review by this Court.

Respectfully submitted,

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